IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-807

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, an Illinois Political Subdivision, JOHN R. CANTERBURY, JAMES A. CUMMINGS, BONNIE W. NOBLE, CLYDE WEST, HAROLD A. (PETE) VONACHEN, JR., Individually and Members of the Board of Trustees of the Pleasure Driveway and Park District of Peoria; RHODELL E. OWENS, Individually and as Director of Parks and Recreation; JACK M. FULLER, Individually and as Administrative Assistant; DANIEL B. OHLEMILLER, Individually and as Business Administrator; FRANK D. BORROR, Individually and as Superintendent of Maintenance; WILLIAM McD. FREDERICK, Individually and as Attorney of Pleasure Driveway and Park District of Peoria,
Petitioners,

v.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES and RICHARD HOADLEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Seventh Circuit

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Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on September 11, 1978 reinstating its opinion of May 26, 1977 which reversed a judgment of the United States District Court for the Southern District of Illinois in favor of the Petitioners, dismissing Respondents' Complaint.

OPINIONS BELOW

The latest opinion of the United States Court of Appeals is set out in Appendix A, and is not yet reported. The order of this Court vacating the prior judgment of the United States Court of Appeals is set out in Appendix B, and is reported at — U.S. —, 98 S.Ct. 1642 (1978). The prior opinion of the United States Court of Appeals is set out in Appendix C, and is reported at 557 F.2d 580 (7th Cir. 1977). The order of the United States Court of Appeals denying Petitioners' petition for rehearing *en banc* is set out in Appendix D. The order and opinion of the United States District Court for the Southern District of Illinois is set out in Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals below [App. A] was entered on September 11, 1978. This Petition for Writ of Certiorari was filed within ninety (90) days of the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether determination of facts in state court litigation which are essential to federal claims precludes relitigation of those factual issues in subsequent federal antitrust and civil rights actions?

2. Whether the actions of a unit of local government, taken pursuant to the requirements of state statute and clearly articulated state policy which provides for active supervision, are exempt from federal antitrust laws?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are reprinted in pertinent part in Appendix Q:

1. 1970 Illinois Constitution, Article IX, Section 5;
2. 15 U.S.C. §§ 1, 2 and 15;
3. 42 U.S.C., § 1983;
4. Ch. 105, §§ 8-10 and 9.1-1 *et seq.* Ill.Rev.Stat. (1975);
5. Ch. 127, § 132.1 *et seq.*

STATEMENT OF THE CASE

Respondents [hereinafter referred to as "golf pros"], prior to December 31, 1973, pursuant to contracts, were independent contractors, authorized to operate golf pro shops at each of the five public golf courses owned and operated in trust for the public by Petitioner, PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, Illinois. During this period, the golf pros were also employed by the Park District as greenskeepers. The Park District is a unit of local government, organized under Chapter 105 Illinois Revised Statutes. The golf pros and the Park District could not agree to renewal contracts to operate the golf pro shops at the five public golf courses. The Petitioners, Board of Trustees of the Park District, pursuant to the provisions of the Illinois competitive bidding act submitted the contract to operate the golf pro shops at the five public courses for public bidding and voted to approve the highest bid and awarded Golf Shop Management, Inc. [hereinafter referred to as GSM], a three year contract.

On January 21, 1974, each of the golf pros was served with a 30-day written notice to terminate the tenancy of the prem-

ises occupied as pro shops and on January 22, 1974, the golf pros filed an action in the United States District Court, Case No. P-CIV-7[illegible]-11, alleging violations of the Federal Antitrust and Civil Rights Laws. On February 13, 1974, the District Court Judge entered a Decision and Order dismissing the complaint with prejudice [App. H]. The golf pros appealed to the United States Court of Appeals for the Seventh Circuit, Case No. 74-1342. On February 20, 1974, the golf pros were discharged as greenskeepers by the Park District. They did not challenge their discharges by pursuing the administrative remedies available to them.

The golf pros refused to surrender possession of the golf pro shops to the Park District and on February 20, 1974, while the appeal of the federal action was pending, the Park District initiated a forcible entry and detainer action against the golf pros in the Circuit Court of the Tenth Judicial Circuit in Illinois, Peoria County, Case Number 74 M 602, to obtain possession of the golf pro shops and ancillary buildings located on the five public courses. The golf pros counterclaimed and after a jury trial, there was a decision in favor of the golf pros. The Park District appealed that decision to the Appellate Court of Illinois, Third District, Case Number 74-127. The trial court's order of May 6, 1974, in Case Number 74 M 602, provided that the enforcement of the judgment shall not be stayed, and the Illinois Appellate Court on May 7, 1974, stayed the enforcement of the trial court's order pending appeal. Despite that Court's order, the golf pros sought and received from the state trial court a mandatory injunction on June 26, 1974, which granted to them essentially the same relief provided in the trial court order of May 6, 1974. Thereafter, the Park District petitioned the Illinois Appellate Court for a Writ of Prohibition which was issued June 28, 1974, and which directed the trial court to vacate the orders pertaining to the injunctive relief that it had previously entered. The golf pros elected to challenge the authority of the Appellate Court to

issue a Writ of Prohibition, and on September 23, 1974, filed a Motion for Leave to File Original Action for Writs of Mandamus, Prohibition and Supervisory Orders with the Illinois Supreme Court, Case Number 47015. The Third District Appellate Court and each judge of that Court were named as respondents. The Petition alleged that the proceedings and orders of the respondent Appellate Court constituted an abuse of judicial power, the abnegation of judicial duty and a means of defeating original and appellate jurisdiction in a manner which could not be remedied through the ordinary course of appeal. The Supreme Court denied leave to file the Petition on September 26, 1974.

On March 27, 1975, the Illinois Appellate Court filed its opinion in Case No. 74-127 reversing the order of the trial court [App. J]. The Illinois Supreme Court denied the golf pros' Petition for Appeal on May 27, 1975, and after the golf pros' request for a stay of mandate had been denied, the Clerk of the Appellate Court issued a Writ of Restitution on June 30, 1975, returning possession of the golf pro shops to the Park District.

There then ensued a series of attempts, some nine in number, by the golf pros to get either the Appellate Court of Illinois, Third District, or the Supreme Court of Illinois, Case Numbers 47045, 47469 and 47810, to reverse the Appellate Court's decision and for other relief. All were unsuccessful. The Park District finally obtained possession of the golf shops some eighteen months after the golf pros' possessory rights, as a matter of law, had expired.

While the state court appeal was pending, the United States Court of Appeals for the Seventh Circuit, although it found no cause of action alleged under either the Federal Antitrust or Civil Rights Acts, reversed and remanded the case to the District Court for a hearing on the golf pros' motion to open, alter

or amend the judgment. [App. G]. On remand the golf pros moved for voluntary dismissal of their federal case, which was allowed.

On July 25, 1975, the Park District filed an action in the Circuit Court of the Tenth Judicial Circuit of Illinois for damages against the golf pros because of their illegal holding over of possession of the golf pro shops after their rights thereto had expired. In response thereto, the golf pros filed an answer, five affirmative defenses, and a counterclaim. The counterclaim as originally filed sought treble damages under the Illinois equivalent of the federal antitrust laws and was dismissed pursuant to motion. Subsequently, the golf pros filed a sixth defense, and an amendment, and a second amendment to the counterclaim. Most of the amended counterclaim was stricken, but Paragraph 6(f) which reads:

> "They [Park District, etc.] summarily and unlawfully terminated defendants' salaried employments."

was permitted to stand. After an extensive hearing on the merits, a judgment was entered for the Park District on its claim and against the golf pros on their counterclaim for alleged summary and unlawful termination [App M]. The golf pros appealed to the Appellate Court of Illinois, Third District, which affirmed the Circuit Court decision [App K]. Rehearing was denied.

After the golf pros had vacated the golf shops, they filed three additional lawsuits challenging the Park District's right to possession. On August 8, 1975, a claim for forcible entry and detainer was filed against GSM, Case Number 75 M 3128, which was then in possession of the shops. That action was dismissed with prejudice, the golf pros were enjoined from filing any other suits challenging possessory rights to the golf concession shops, and judgment for attorney's fees was entered upon a finding that the allegations of the complaint were without reasonable cause and not in good faith [App. N]. An appeal was filed in

the Illinois Appellate Court, Case No. 75-318, and the Park District filed a motion to dismiss the appeal. The motion was allowed and the appeal was dismissed November 19, 1975.

On August 15, 1975, a second federal suit, Case Number P-CIV-75-60, was filed in the Federal District Court naming as defendants the petitioners here, their attorneys, and the Appellate Court of Illinois and the individual Appellate Judges, alleging that the golf pros' rights to petition, to due process, and to equal protection of the law were violated by the state court proceedings. That claim was dismissed on the ground that the complaint sought to re-litigate issues which had been finally determined in the courts of Illinois [App. I]. No appeal was taken.

As the third federal suit, the golf pros brought this two count action against Petitioners, Pleasure Driveway and Park District of Peoria, Illinois, a unit of local government; members of its Board of Trustees; its Director and Administrative Assistant; its Business Administrator; its Superintendent of Maintenance; its Attorney; GSM, and Gordon A. Ramsey, GSM's alleged sole incorporator. Count I is under 15 U.S.C. § 1, § 2, § 15 and § 26, seeking to have the contract declared null and void, to preliminarily and permanently enjoin the performance of it, and for damages in the amount of three times the amount the golf pros may be required to pay by reason of the state court judgments. Count II is under 42 U.S.C. § 1983 seeking damages for alleged wrongful termination of their employment as greenskeepers.

The Petitioners filed a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that Counts I and II failed to state claims for which relief could be granted; the complaint improperly sought to pursue a cause of action similar to ones which were unsuccessfully pursued by the golf pros in the state courts of Illinois; and that the orders of the State Courts of Illinois and the Federal District Court were *res judicata* of the matters and things alleged in the com-

plaint. The District Court Judge found that as to Count I to the extent the same issues were raised as were raised in a previous federal action, P-CIV-74-11 the Respondents were barred by the principles of *res judicata* and as to any additional issues the Petitioners were immune from the Federal Antitrust Laws. As to Count II the District Court Judge found the issues which the Respondents sought to litigate were previously adjudicated on the merits in the state courts. Accordingly, an order was entered allowing the motion to dismiss and dismissing the action with prejudice [App. F]. The golf pros appealed from this order and the United States Court of Appeals for the Seventh Circuit reversed in part and remanded [App. C].

It was this order of the Court of Appeals of the Seventh Circuit that was the subject of the Petitioners' previous petition for certiorari. The Supreme Court granted the previous petition for certiorari, vacated the judgment of the Court of Appeals and remanded for reconsideration [App. B]. On remand the Court of Appeals for the Seventh Circuit reinstated its previous opinion which had been vacated [App. A].

It is this order of the Court of Appeals of the Seventh Circuit that is the subject of this petition for certiorari.

ARGUMENT

I

The Federal Courts Should Give Preclusive Effect to Essential Facts Determined in State Court Proceedings if the Factual Issues Were Fully Litigated in the State Court Forums Chosen by the Golf Pros and if Those Issues Involve Areas of Law Within the Expertise of the State Courts.

This case is the most recent of a series of more than 30 actions and appeals that have resulted in excess of five thousand pages of pleadings, exhibits, testimony and judicial decisions. All prior cases, except the Court of Appeals' decision below, were decided in favor of the Park District. These prior decisions have adjudicated essential facts that preclude plaintiffs' allegations necessary to their claims.

A. Antitrust Claim

This case presents the Court the opportunity to establish and promulgate a standard for reconciling the conflict between the countervailing purposes of collateral estoppel[1] and exclusive federal jurisdiction.[2] That resolution presents significant legal

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[1] Whatever else the term "collateral estoppel" might mean or imply, it is used herein solely as a synonym for the traditional principles of "issue preclusion" which in turn is defined as:

> "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT [Second] OF JUDGMENTS, §68 (Tent. Draft No. 4, 1977).

[2] Congress has given federal courts "exclusive jurisdiction" in cases involving patents, copyrights, antitrust law, securities law, admiralty, and bankruptcy. In this general sense the term "exclusive jurisdiction" can mean either concurrent jurisdiction, or as in the case of admiralty and bankruptcy, exclusive jurisdiction. The term is used here as it relates to the antitrust laws only.

issues affecting federal-state relations, the doctrines of full faith and credit and comity,[3] and the effective administration of justice. Historically, the underlying purposes of exclusive jurisdiction have been to provide uniform interpretations of the law, to prevent local bias, and to assure maximum expertise in federal matters. These purposes conflict with the equally valid purposes underlying the doctrine of collateral estoppel: to prevent inconsistent results, to avoid repetitious suits wasteful of judicial time, to conclude litigation, to prevent harassment, and to minimize "forum shopping". *The Collateral Estoppel Effect of Prior State Court Findings In Cases Within Exclusive Federal Jurisdiction*, 91 HARV.L.REV. 1281 (1978).

This Court has not considered the preclusive effect of state court determinations of fact in areas of exclusive federal jurisdiction since *Becher v. Contoure Laboratories, Inc.*, 279 U.S. 388 (1929). In that case, an inventor employed Becher to construct an invention. In violation of his employment agreement, Becher obtained a patent on the invention. The inventor brought suit in state court and won damages for breach of contract and breach of fiduciary duty. Becher then brought suit in federal court for patent infringement, an area of exclusive federal jurisdiction. Nevertheless, because the Court recognized that the issues of fact and law were similar, the Supreme Court ruled that state court determinations precluded relitigation of the issues in federal court.

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[3] The doctrine of "comity" while not directly argued here, underlies this entire litigation and is crucial. The guiding principle, as this Court has repeatedly stated, is:

> "The notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Juidice v. Vail*, 430 U.S. 327 (1977), quoting from *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 601 (1975) which quoted from *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The instant case presents an analogous situation. The golf pros brought suit in state court using a multitude of permissive counterclaims to determine the validity of their loss of contractual and possessory rights to lease golf course concession shops and to serve as greenskeepers. The state courts held that the lease agreements and possession rights had expired, that the termination of the contracts was valid and legal, and that subsequent contracts for operation of the golf course concession shops were valid arms-length contracts. Each of those determinations was appropriate for the expertise of the state courts.

The golf pros have brought this federal action on the grounds of violation of antitrust law. In support thereof, the pros have alleged that their contracts were illegally terminated despite the numerous state court rulings to the contrary. These allegations are essential to the antitrust claim. Although this suit is in an area of federal court expertise, the underlying factual allegations are in areas of state court expertise. Therefore, the Court of Appeals should have applied the reasoning of *Becher* to preclude relitigation of these factual issues, thereby necessarily dismissing the complaint.

Because collateral estoppel and exclusive jurisdiction both serve to achieve fundamental judicial policies, cases in which these doctrines conflict require careful judicial scrutiny. If the Court refuses to recognize the countervailing policies, simplistic decisions may result. Thus, for example, if the Court accepts the dictates of the collateral estoppel doctrine, without consideration of the exclusive jurisdiction doctrine, the federal court may fail to fulfill its function of providing uniform decisions and special expertise. If, however, the Court follows the exclusive federal jurisdiction principle, without considering collateral estoppel, the federal court may infringe on state law by litigating questions that are better resolved by the expertise of state courts and undercut the integrity of prior state determinations by inconsistent results. In the instant case, the Court of Appeals considered only the doctrine of exclusive jurisdiction. In neglecting

to consider the collateral estoppel effect of prior state court decisions arising from the same factual allegations, the court creates the potential for conflicting resolution of factual questions that are appropriate for state court expertise.

In pertinent part, the Court of Appeals' decision states:

> "Defendants' [petitioners] arguments that the antitrust claims have been adjudicated in state court procedures are insupportable both because the state courts have not in fact purported to do so, and because jurisdiction of federal antitrust suits is exclusively in the federal courts [cite omitted]. Needless to say, at the pleading stage at which this case is, we decline to consider defendants' numerous arguments that reduce effectively to the assertion that plaintiffs cannot prove the allegations we have held sufficient to state a claim for which relief can be granted." [Pg. A-2]

The Court has misconstrued the Petitioners' argument. Petitioners contend neither that the federal antitrust claims were litigated in the state courts, nor that state courts have jurisdiction to adjudicate those claims. Rather, Petitioners maintain that factual questions essential to the respondents' antitrust claims were litigated and determined in numerous state court decisions. These factual questions concern state law and interpretation of the State's Constitution and statutes. Because the parties had the opportunity to fully litigate these factual issues, because the expertise of the Illinois courts in these areas of law is superior to that of the federal courts, and because the state's interest in the integrity of those determinations overrides the federal interests in determinations of state law, collateral estoppel precludes relitigation of the issues. The district court properly recognized the preclusive effect of the state court decisions. [App. F].

The pertinent factors present in the record here include determinations by the state courts in matters uniquely of state concern and expertise involving possessory actions, damages for wrongful holdover, contract actions, employment rights, and

matters of state Constitution and statutory construction. The state courts determined that: (1) the alleged "sham" contract was a valid, arms-length contract, arrived at through open competitive bidding, consistent with the clear public policy of state laws, [App. K and M]; (2) the alleged "sham" contract was a measure of the fair value of the premises and/or licenses for the concession rights, [App. K and M]; (3) the pros' "rights" to possession and operation of the golf courses ended December 31, 1973, with the end of their concession contracts, [App. J]; (4) that the alleged "sham" contract was neither an illegal sales tax nor an attempt to punish the pros, [App. K and M]; and(5) that the golf pros' employment rights were not improperly terminated, [App. K and M].

While one state court did hold there was no violation of the Illinois Antitrust Act [App. M], it is *not* that ruling which we contend has collateral estoppel effect. It is rather the determinations as to "constituent facts"[4] that are preclusive as to the claimed federal violation. In *Becher, supra,* the state court litigation of the claims of breach of contract and breach of fiduciary duty necessarily determined the validity of the patent involved there. Therefore, in the subsequent federal patent infringement action, the Court precluded relitigation of the validity of the patent, a fact essential to the infringement action. Similarly in the instant case, the state court litigation of the claims of possessory rights to the concession shops necessarily determined that the golf pros' contract rights had ended and that they had no claim to concession rights after December 31, 1973. [App. J]. The state court litigation of the damages due the Park District for the golf pros' wrongful hold-

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[4] Courts have used various terms such as "constituents facts", "essential facts", "vital facts", "key ingredients", or "determinative issues", all representing the state court's determinations which preclude relitigation. The better rule is that determinations of questions of fact and mixed questions of law and fact have preclusive effect. RESTATEMENT [Second] OF JUDGMENTS §68 (Tent. Draft No. 4, 1977).

over necessarily determined that the contract with GSM was a valid, arms-length, openly bid contract which constituted the "measure of value of the concession license" and therefore, the measure of damages. [App. K and M]. Therefore, as in *Becher, supra,* the Court should preclude relitigation of the validity of the GSM contract, a fact essential to plaintiffs' antitrust action.

These state court factual findings refute the golf pros' allegations, which the Court of Appeals accepted as true in order to construe the complaint as stating a cause of action. Because these issues were fully litigated, the state court determinations should preclude further litigation of the factual issues by the federal court. Such issue preclusion merely would prevent the federal court from infringing on areas of law that were appropriate for state court determination. Further, issue preclusion would insure consistent results between the factual findings of the state and federal courts. Moreover, no extrinsic factors exist that suggest that the golf pros were unable to obtain fair consideration of their case within the state court system. The golf pros were not forced to litigate their claims in state court. Rather, the golf pros chose those forums for their claims. The first cause of action brought by the golf pros was presented in federal court in 1974. After requesting a voluntary dismissal of that action, the golf pros continued litigation in numerous actions in the state courts. Having chosen their forums and having litigated fully all factual issues that underlie their allegations in the instant case, the golf pros should be bound by those factual determinations.

By refusing to allow the district court to consider the collateral estoppel effect of state court determinations of facts relating to state law, the Court of Appeals at once rejects the claim that the lower federal court has no power to reverse state court findings and fails to comply with traditional doctrines of issue preclusion in the area of antitrust laws. The

court implied on the basis of exclusive jurisdiction that federal courts are the sole arbiters of all issues involved in antitrust litigation. The harm to federal-state relations, the doctrines of comity and full faith and credit, and the public perception of the legal systems resulting from such an approach requires reversal by this Court.

While in conflict, the salutory principles of the *Becher* case have been followed by the lower federal courts. *Collidotronics, Inc. v. Stuyvesant Ins. Co.*, 290 F. Supp. 978 (E.D. Pa. 1968), *aff'd per curiam*, 412 F.2d 1186 (3rd Cir. 1969); *Azalea Drive-In Theatre, Inc. v. Hanft*, 540 F.2d 713 (4th Cir. 1976), and *Singer v. Hollander & Son, Inc.*, 202 F.2d 55 (3rd Cir. 1953); see also *Straus v. American Publishers' Ass'n*, 201 F. 306 (2nd Cir. 1912). The opinion below is in direct conflict with those principles and decisions.

In order to examine fully and to set out the applicable rules of issue preclusion in cases involving exclusive jurisdiction and to avoid the specific conflict in decisions arising from the Court of Appeals' misconstruction, this Court should grant this petition and fully review the proceedings below.

B. Civil Rights Claim

The Court of Appeals' decision reduces plaintiffs' civil rights claims to the sole allegation that:

> ". . . plaintiffs were summarily terminated from their public employment positions because they asserted rights of petition and to due process by litigating their defenses to the Park District forcible entry and detainer action." [Pg. A-27].

Civil rights claims are within the competency of state courts to decide and unlike the antitrust laws, are *not* an area Congress has committed to the "exclusive jurisdiction" of the federal

courts. Hence broader collateral estoppel rules have historically been applied to civil rights cases. See *Thistlewaite v. City of New York*, 497 F.2d 339 (2nd Cir. 1974); *Brown v. DeLayo*, 498 F.2d 1173 (10th Cir. 1974); *Reich v. City of Freeport*, 527 F.2d 666 (7th Cir. 1975); *Phillips v. Shannon*, 445 F.2d 460 (7th Cir. 1971); and *Lovely v. Laliberte*, 498 F.2d 1261 (1st Cir. 1974); Cert. Den. 419 U.S. 1038 (1974). However, the analysis under Part A above applies to some extent here as the purposes underlying collateral estoppel are identical.

This Court has established the rules applicable to collateral estoppel and federal-state judicial relations through *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and its progeny.[5] If a litigant chooses to advance his civil rights claims in state court forums, though not required to, *and* unreservedly litigates those claims there, he may not ignore adverse state decisions and relitigate the claim in District Court. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 419 (1964). The underlying purposes of this rule are identical to those underlying collateral estoppel to prevent district courts from reviewing or reversing state court determinations, to avoid repetitive litigation and "career litigants" and the inevitable friction that would arise between state and federal courts.

The Court of Appeals recognized these rules [Pg. A-29] but disregarded them, saying:

> "We do not agree with the district court however, that Judge Iben's [state trial judge] finding disposed of plaintiff's claim herein or of critical facts pertinent to it."

Judge Iben's ruling was then on appeal in the state appellate court. Notwithstanding the Court of Appeals' finding, the golf pros filed the Court of Appeals' decision with the state appellate court claiming that the federal and state cases involved

[5] By "progeny" we include the decisions in *Thistlewaite, infra; England, infra; Reich, infra; Lovely, infra;* and *Phillips, infra.*

the same subject matter, were directly connected and specifically referred to the state court counterclaim and the Court of Appeals' decision on the civil rights claim. [App. L]. That appellate court's decision considered the Court of Appeals' finding that Judge Iben had not disposed of the claim, and *rejected it*, saying:

> "The Seventh Circuit found that Judge Iben had not disposed of the golf pros' claim or of critical facts pertinent to it and reversed and remanded the cause for further proceedings. . . . From a review of [golf pros'] brief in this cause, of which the Circuit Court of Appeals was unaware, all the reasons why defendants' discharge should be considered wrongful were or could have been argued and resolved in the case before the circuit court of Peoria County." [App. K].

When the Court of Appeals was informed of these points, on remand from this Court's original grant of certiorari, it responded:

> "It is true that the appellate opinion does indicate that facts not in our record may demonstrate that the right to petition claim was in truth before the Circuit Court and decided by it, and defendants will be free to renew this argument on remand. But it is the judgment, properly construed in the light of pertinent facts, that creates the potential for collateral estoppel, not the appellate decision affirming it. The district court must determine for itself whether estoppel is justified on plaintiffs' federal claim, and doing so will not, as defendants argue, place the court in the untenable position of reviewing a state court judgment. The collateral estoppel effect on a federal claim of a state court judgment can only be decided by the federal court before which the claim is litigated." [Pg. A-2].

The Court of Appeals ignores, however, that the federal district court did determine that the state court claim precluded federal relitigation of the issues. The district judge stated:

> "The court need not decide whether a cause of action exists against the Park District, however, because the court considers any civil rights claim based on these operative facts barred by previous state court decisions. . . . As to plaintiffs' contention that termination of their employment as greenskeepers, because they undertook to litigate their claim of rightful possession of the pro shops, violated the Petition Clause of the First Amendment, Judge Iben of the Tenth Judicial Circuit of Illinois found that the reason for their discharge was not the exercise of the right to litigate issues, but, rather, their insistence on holding over in possession of the pro shops after the termination of their 'leases', to the detriment of the Park District. The right to litigate does not carry with it a right to lose with impunity.
>
> "When the issues in the state proceedings are substantially identical and are decided on the merits, subsequent civil rights claims are barred. *Phillips v. Shannon*, 445 F.2d 460 (7th Cir. 1971). The issues which plaintiffs seek to litigate here were previously adjudicated on the merits, and defendants' motion to dismiss must be allowed as to Count II." [App. F].

Thus, the Court of Appeals' decision misconstrues not only the issues that the state courts considered and determined, but also those that the federal district court considered and determined. These errors strongly suggest that the Court of Appeals simply was not satisfied with the results below, and, by its reversal, granted review of the state court decisions and relitigation of the claim. Either act by the Court of Appeals is in error and the Petitioners request this Court, in the exercise of its supervisory powers and in the interests of consistency, uniformity and fairness, to review fully the decision below and to reverse that decision.

II

The Decision Below Interprets *City of Lafayette, La. v. La. Power & Light Co.* to Subject a Non-Municipal Unit of Local Government Acting Pursuant to the Requirements of State Statute and Clearly Articulated State Policy to Alleged Violations of the Federal Antitrust Laws.

The decision below presents this Court the issue of determining the type and scope of state statutory mandate that is sufficient to immunize a unit of local government from federal antitrust laws. This issue was left unresolved in *City of Lafayette, La. v. La. Power & Light Co.*, — U.S. —, 98 S.Ct. 1123 (1978) [hereinafter referred to as *Louisiana Power*, with page citations to the Supreme Court Reporter Edition] in which the Court held that in the absence of direction or mandate from the state sovereign, a local government unit was not immune[6] from antitrust laws. This Court, however, has not yet had the opportunity to apply the *Parker v. Brown*, 317 U.S. 341 (1943) and *Louisiana Power* test in a positive fashion to a subordinate unit of local government. Only in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) has this Court held the *Parker Doctrine* affords immunity, but there a State Supreme Court, not a subordinate unit of government, was involved.

The instant case involves actions of the Park District, a non-municipal unit of local government, taken pursuant to state statutory direction. The Illinois Legislature has by statute clearly said that competitive bidding is the rule in public contracts and

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[6] While we use the terms "exempt" or "immune" from antitrust laws, we do so merely as a short-hand reference to the *Parker Doctrine* and its development in recent cases.

sufficient charges for the use of public facilities must be made. Ch. 127, §132.2 and Ch. 105, §9.1-1 *et seq.*, Ill.Rev.Stat. (1975).

Although the Court of Appeals' language at many points anticipates the language used by members of this Court, the application of those phrasings to this case is completely inconsistent with this Court's decision in *Louisiana Power*. The application of the *Louisiana Power* test in this case is tantamount to excluding all units of local government from exemption from antitrust laws. We contend that if this case and the Illinois statutes are not sufficient to allow exemption, then no clear State mandate could be found and for all intents and purposes the *Parker Doctrine* for local units of government is dead. If no exemption applies in this case, the next competitive bid in Illinois, and there are thousands each year, invites any "losing" bidder or non-bidder to sue the governmental unit for antitrust violations. The only alternative is to comply with the antitrust laws and violate the state laws requiring competitive bidding. The unacceptability of that alternative is the real problem this Court is asked to face. Are units of local government to comply with state or federal mandates when punitive treble damages are at stake?

The decisions below subject the Park District to federal antitrust laws for alleged monopolization and price fixing. Despite the Supreme Court's instruction that the prior decision be reconsidered in light of *Louisiana Power*, the Court of Appeals merely has reinstated its previous holding [App. A and C]. A reconsideration of this case requires an examination of the policies underlying the holding in *Louisiana Power* to insure a resolution of this case that is consistent with *Louisiana Power*.

The federal antitrust laws do not express a congressional intent to diminish the authority of the state. In accordance with the principles of federalism, this Court has held the federal antitrust laws were not intended to apply to action by states.

Parker v. Brown, supra. Because a state may delegate its authority to its subdivisions, certain actions taken by a state subdivision also may be exempt from the federal antitrust laws. To prevent conflict with the established principles of federalism, the *Louisiana Power* decision has created a test to determine when political subdivisions of the state are exempt from federal antitrust laws. This Court's standard provides that if the state authorized a municipality to act in a way that may have anticompetitive effects and the action so taken is pursuant to state direction or command, the municipality is not subject to conflicting federal antitrust laws. [*Louisiana Power*, p. 1137]. Moreover, even in the absence of specific, detailed state legislation, the acts of a municipality may be exempt from federal antitrust laws if, based on general grants of authority, the state legislature contemplated the kind of action taken by the municipality [*Louisiana Power*, p. 1138]. Thus, the standard established in *Louisiana Power* not only protects the sovereignity of the state but also prevents a municipality's assuming powers to subordinate the national economic interest to its own parochial interest.

In the instant case, the Park District, a non-municipal unit of local government, leased property to a private corporation pursuant to the authorization and direction of the Illinois Legislature. The acts taken by the Park District not only were in the contemplation of the Legislature but were mandated by it. The Park District's actions at all times were subject to the supervision of the electorate and the State. Moreover, these actions comported with the Federal policy of encouraging business competition. Therefore, proper application of the standard established in *Louisiana Power* requires that the actions taken by the Park District in the instant case be exempted from federal antitrust laws.

The Park District is a unit of local government authorized and existing under Ch. 105, Ill.Rev.Stat. (1975) with power to operate golf courses as well as necessary facilities pertinent there-

to. Ch. 105, § 8-10; § 9.1-1, Ill.Rev.Stat. (1975). The Park District was involved in operating public golf courses on public land. Its elected trustees, in carrying out their official duties with which they are charged by the state, awarded the right to operate the golf pro shops at the five public courses to GSM, the highest bidder, as required by the Illinois Purchasing Act, Ch. 127, § 132.1 *et seq.*, Ill.Rev.Stat. (1975) [herein referred to as the "competitive bidding act"].

§ 132.2 of the competitive bidding act states:

> "It is the purpose of this Act and is hereby declared to be the policy of the State that the principle of competitive bidding and economical procurement practices shall be applicable to all purchases and contracts by or for any State agency."

The state legislature also has set out specific *requirements* in the Park District Code [Ch. 105, Ill.Rev.Stat. (1975)] relating to golf courses and facilities. The following are excerpts from cited sections of the Park District Code:

> "Any park district has the power, *subject to the limitations* of Section 9.1-1 through 9.1-6 . . . to . . . operate golf courses and toilet, locker and other necessary facilities pertinent thereto . . . to issue its bonds, payable solely from the revenue derived from the operation of such golf courses and facilities [9.1-1]. . . . The [district's] ordinance *shall* also pledge the revenue derived from the operation of the golf courses for the purpose of paying maintenance and operation costs, providing an adequate depreciation fund, and paying the principal and interest of the bonds issued hereunder. [9.1-1] . . . Bonds issued under Section 9.1-1 of this Article shall be payable solely from the revenue derived from the operation of the golf course, or courses . . . [9.1-3] . . . Each park district which issues bonds and acquires or constructs . . . facilities *shall charge for the use thereof at a rate which at all times is sufficient to pay maintenance and operation costs.* . . . Such district may make, enact, and enforce all needful rules and regulations for the . . . *management* . . . of its golf course and for the use thereof. . . . [S]uch district is *required* to maintain and operate its golf course or courses, as long as it can do so, out of the revenue derived from the operation thereof. . . . [9.1-5] *The holder of any bond . . . issued under Section 9.1-1 of this Article in any civil action, mandamus or other proceeding, may enforce and compel performance of all duties required by Section 9.1-1 through 9.1-5 of this Article. This shall include the duties of establishing and collecting sufficient rates or charges.* . . . [9.1-6]" [Emphasis added.]

These requirements, imposed by the Illinois Legislature in addition to the provisions and expressed purpose of the competitive bidding act, are a clear and explicit mandate from the legislature. Moreover, the Park District is subject to the continuing supervision by "any bondholder", the Illinois Attorney General and Secretary of State, as provided in the Park District Code and the competitive bidding act, as well as by the electorate. These requirements and supervision not only meet but exceed the scope of state authorization, proposed in *Bates, supra,* and reiterated with approval in *Louisiana Power,* [p. 113] that is necessary for exemption from federal antitrust laws:

> ". . . [T]he State policy requiring the anti-competitive restraint as a part of the comprehensive regulatory system, was one *clearly articulated* and *affirmatively expressed* as State policy, and that the State's policy was *actively supervised.* . . ." [Emphasis added.]

We contend that these holdings were necessary to prevent a state subdivision from facing the "Hobson's choice" of complying with federal antitrust laws or complying with the spirit and letter of the state sovereign's laws and violating the federal antitrust laws with potential treble damage liability.

Yet, the Court of Appeals' decision in the instant case compels the Park District to face just such a choice. The Park District, in addition to its responsibility to its electorate, must comply with the policy of the State of Illinois that requires the District to receive the highest fees for concession rights that private responsible bidders will offer. The Court of Appeals has indicated, however, that by following these provisions the Park District may be subject to federal law for alleged violations of the Sherman Act. Nevertheless, if the Park District had failed to comply with the competitive bidding act, the Park District could have been subject to legal action by the Attorney General or Secretary of State, Park District bondholders, as well as subject to suit by the "losing" bidder. Unless these pros are held to have a special right to the property of the People of Illinois, and the state courts have repeatedly held otherwise [see Point I herein], the highest responsible bidder was entitled to, and the Park District was *required* to, award the concession rights. Nothing in the antitrust laws creates a right or tenure to public property, which is inevitably all that the plaintiffs prayed for here.

The instant case, as a matter of law, is readily distinguishable from previous cases in which this Court has held a state subdivision subject to the federal antitrust laws. The state legislative mandate in the instant case more clearly and specifically directs the action that the unit of local government took. In *Louisiana Power*, for example, the state legislature merely provided the city the authority to provide utility services. But the legislative directive did not contain a framework detailing how those services should be provided. Similarly, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), [hereinafter referred to as *Goldfarb*] the state authorized the Virginia Bar Association, through the state's Supreme Court, to regulate certain activities of attorneys. The state legislature, however, did not statutorily provide how such regulation was to be effected or its end results. In contrast, the Illinois Legislature in the instant

case not only has provided the Park District with the authority to run golf courses and to lease its property, but also has directed how such operations should be effected through specific requirements. The separate statutory mandate of competitive bidding, taken with statutory requirements for charges for use of the concession facilities, are additional legislative directives. No such comparable mandates existed in *Goldfarb* or *Louisiana Power*. Furthermore, the potential enforcement by the state's Attorney General or Secretary of State, or local bondholders provides an indication of the scope of the state's directive. Although certain powers of the state have been delegated to the Park District, the state has retained control in that area through the requirements it has enacted.

The Court of Appeals' opinion unduly emphasizes the plaintiffs' allegations that the Park District by following the state's directive forced the plaintiffs to fix retail prices. Plaintiffs' allegations of price fixing rely on their allegations of a "sham contract" with the successful bidder. The court indicated that the alleged price fixing was germane to the issue of whether a state mandate existed. However, the state mandate of competitive bidding is clearly evidenced in the Illinois statutes, Ch. 127, § 132.2 Ill. Rev. Stat. (1975). The alleged price fixing, therefore, is not germane either to the existence of a state mandate or to the exemption of the Park District from antitrust laws. Rather, the alleged price fixing is central to the issue of whether the Park District properly followed the state's competitive bidding requirements. That issue is not properly before this Court. Collateral estoppel, as recognized by the District Court, has established the genuineness of the Park District's contract, the bidding procedures used, and the results of that procedure. [See Point I herein.]

The Seventh Circuit decision in the instant case illustrates the realization of the fears expressed by the dissenting justices in *Louisiana Power*. Mr. Justice Stewart, in his dissenting opin-

ion, suggests that judicial interference will reduce state autonomy and will impair effective municipal government. That opinion focuses on municipalities' potential reluctance to take any action not explicitly directed by the state. The Court of Appeals' resolution of the instant case suggests that that reluctance will be necessary even with the existence of an explicit state mandate. The decision below will also provide the opportunity for any unsuccessful bidder to allege restraint of trade and monopoly violations of federal antitrust laws and vitiate the state's competitive bidding requirements. The Court in *Louisiana Power* certainly did not intend such an effect. Here the state's requirement, i.e., competitive bidding in public contracts, *is* "inherently more likely to comport with the broader interests of national economic well-being than those of private corporations acting in furtherance of the interests of the organization and its shareholders". [*Louisiana Power*, p. 1131]. It is directly attuned to the policies and intent of the federal antitrust laws. Unless this Court reverses the Court of Appeals' decision, *Louisiana Power* as interpreted by the Seventh Circuit, will have created a new federal cause of action in which the federal judiciary will interpret and review specific state legislative mandates to its subdivisions. If the plaintiffs in this case perceive abuse of the state's mandate, their remedy was not in federal antitrust litigation but in a state action, which has been previously litigated.

A full hearing should be granted in the present case so that this Court may consider the important antitrust issues presented by the decisions below.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 13, 1978

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1791

William Kurek, et al.,

Plaintiffs-Appellants,

v.

Pleasure Driveway and Park District of Peoria, Illinois, et al.,

Defendants-Appellees.

On Remand from the Supreme Court of the United States

Decided September 11, 1978

Before Fairchild, *Chief Judge*, Pell, *Circuit Judge*, and Foreman, *District Judge*.*

Per Curiam. This case is again before the court on remand from the Supreme Court of the United States, which vacated this court's prior judgment herein, *see* 557 F.2d 580 (7th Cir. 1977), with directions to reconsider it in the light of the recently decided case of *City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, — U.S. —, 98 S.Ct. 1123 (1978). The parties have filed statements pursuant to Circuit Rule 19, which we have considered along with the *Louisiana Power* decision.

As to plaintiffs' antitrust claims, which are the only ones affected by *Louisiana Power*, we reinstate our prior judgment, finding, as we do, that our prior decision correctly anticipated the Supreme Court's holding therein. Defendants' arguments

* District Judge James L. Foreman of the Eastern District of Illinois is sitting by designation.

that the antitrust claims have been adjudicated in state court proceedings are insupportable both because the state courts have not in fact purported to do so, and because jurisdiction of federal antitrust suits is exclusively in the federal courts. *See* 15 U.S.C. §§ 15, 26; 28 U.S.C. § 1337. Needless to say, at the pleading stage at which this case is, we decline to consider defendants' numerous arguments that reduce effectively to the assertion that plaintiffs cannot prove the allegations we have held sufficient to state a claim for which relief can be granted.

As to plaintiffs' claim that their dismissal as Park District employees violated their right to petition and therefore is actionable under 42 U.S.C. § 1983, defendants insist that the opinion of the Illinois Appellate Court, 3d District, in *Pleasure Driveway and Park District of Peoria v. Jones*, 51 Ill. App. 3d 182, 367 N.E.2d 111 (1977), affirming the judgment discussed in our previous opinion, forecloses this cause of action. We disagree. On the basis of the record before us, we held that the judgment did not foreclose the claim. We adhere to that view. It is true that the appellate opinion does indicate that facts not in our record may demonstrate that the right to petition claim was in truth before the Circuit Court and decided by it, and defendants will be free to renew this argument on remand. But it is the judgment, properly construed in the light of pertinent facts, that creates the potential for collateral estoppel, not the appellate decision affirming it. The district court must determine for itself whether estoppel is justified on plaintiffs' federal claim, and doing so will not, as defendants argue, place the court in the untenable position of *reviewing* a state court judgment. The collateral estoppel effect on a federal claim of a state court judgment can only be decided by the federal court before which the claim is litigated. The opinion of the Illinois Appellate Court, of course, may carry as much persuasive weight as is justifiable in terms of the facts when the district court makes that decision, but it cannot foreclose inquiry.

Although plaintiffs do not request us to do so, we also now reverse the district court's judgment insofar as it dismissed the civil rights claim against the Park District. An appellate court must decide the cases before it on the basis of the law currently applicable, *see Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 711 (1974), and *Monell v. New York City Department of Social Services*, — U.S. —, 46 U.S.L.W. 4569 (June 6, 1978), establishes that governmental units may be "persons" within the meaning of 42 U.S.C. § 1983. Whether this is an appropriate case for application of *Monell* will be a question for the district court on remand.

Plaintiffs have abandoned their original request that we reconsider our decision reported at 574 F.2d 892 (7th Cir. 1978), denying injunctive relief against collection of state court judgments against them.

The case is remanded to the district court for further proceedings. As we have indicated, Circuit Rule 18 will apply. The mandate will issue forthwith.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 24, 1978

W. McD. Frederick, Esq.
Kavanagh, Scully, Sudow, et al.
700 Commercial Nat'l Bank Bldg.
Peoria, IL 61602

RE: Pleasure Driveway and Park District of
Peoria, Illinois, et al.
v. William Kurek, et al.
No. 77-440

Dear Mr. Frederick:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. — (1978). Mr. Justice Stevens took no part in the consideration or decision of this case.

Very truly yours,

MICHAEL RODAK, JR.
Clerk
/s/ J. H. LAZOWSKI
Assistant Clerk

APPENDIX C

Opinion by Judge Pell
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 26, 1977

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. James L. Foreman, District Judge*

William Kurek, et al., Plaintiffs-Appellants,	Appeal from the United States District Court for the Southern District of Illinois, Peoria Division
No. 76-1791 v.	
Pleasure Driveway and Park District of Peoria, Illinois, etc., et al., Defendants-Appellees.	No. P-CIV-76-9 Robert D. Morgan, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Peoria Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED AND REMANDED IN PART, in accordance with the opinion of this court filed this date. Costs are to be awarded to appellants.

---

* Honorable James L. Foreman, Judge, United States District Court for the Eastern District of Illinois, sitting by designation.

In the
United States Court of Appeals
For the Seventh Circuit

No. 76-1791

William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones, and Richard Hoadley,

Plaintiffs-Appellants,

v.

Pleasure Driveway and Park District of Peoria, Illinois, an Illinois Political Subdivision; George L. Luthy, John R. Canterbury, James A. Cummings, Bonnie W. Noble, Clyde West, Harold A. (Pete) Vonachen, Jr., Individually and as President and Members of the Pleasure Driveway and Park District of Peoria; Rhodell E. Owens, individually and as Director of Parks and Recreation; Jack M. Fuller, Individually and as Administrative Assistant; Daniel B. Ohlemiller, Individually and as Business Administrator; Frank D. Borror, Individually and as Superintendent of Maintenance; William McD. Frederick, Individually and as Attorney of Pleasure Driveway and Park District of Peoria; Golf Shop Management, Inc., an Illinois Corporation; and Gordon A. Ramsey,

Defendants-Appellees.

Appeal From the United States District Court for the Southern District of Illinois

No. P. Civ. 76-9—Robert D. Morgan, Judge

Argued January 20, 1977—Decided May 26, 1977

Before FAIRCHILD, *Chief Judge,* PELL, *Circuit Judge,* and FOREMAN, *District Judge.**

PELL, *Circuit Judge.* The district court dismissed Count I of plaintiffs' complaint (alleging federal antitrust violations and invoking 15 U.S.C. §§ 1, 2, 15 and 26) on the authority of *Parker v. Brown,* 317 U.S. 341 (1943); and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and their progeny.[1] Count II of the complaint (alleging deprivations of federal rights under color of state law and invoking 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331(a) and 1343) was dismissed on the grounds that one defendant was not a "person" within the meaning of 42 U.S.C. § 1983 and that the remaining defendants were protected by a previous state court adjudication. This appeal followed.

* District Judge James L. Foreman of the Eastern District of Illinois is sitting by designation.

[1] In its decision and order dismissing the complaint, the district court also denied plaintiffs' motion for partial summary judgment. The court's determination that no cause of action was alleged *a fortiori* precluded independent consideration of this motion. Although we reach a different conclusion on the sufficiency of plaintiffs' complaint, we see no reason to disturb the district court's denial of partial summary judgment. Plaintiffs did in their briefs cite freely to materials tendered in support of their summary judgment motion and requested reversal of the district court's denial of the motion, but they made no contention at oral argument that they were entitled to summary judgment on this record. Moreover, "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . . Trial by affidavit is no substitute for trial by jury . . . ." *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962) (footnote omitted). We do not foreclose the possibility that summary judgment against or in favor of some or all of the defendants may eventually be justified, but we may say with confidence that the present record does not establish that all of the facts material to plaintiffs' complaint are uncontested.

I

We assume, of course, the truth of the well-pleaded facts alleged in plaintiffs' complaint, which are, in material part, as follows: Plaintiffs are five golf professionals, accredited as such by the Professional Golfers' Association. Defendant Pleasure Driveway and Park District of Peoria (the Park District) is a unit of local government within the meaning of Article VII, § 1 of the Illinois Constitution, deriving its powers from various Illinois statutes which will be referred to hereinafter. The Park District owns and operates five municipal golf courses in Peoria, Illinois. Plaintiffs were, for varying periods aggregating 83 years, employed by the Park District to perform combined duties as golf course managers, greenskeepers, and golf professionals at the Park District's courses. Each plaintiff, while so employed, was granted a concession to operate a proprietary retail business (pro shop) selling golfing equipment at his golf course. In this proprietary function each plaintiff competed with each of the others, and between them they constituted the entire public market in Peoria for high quality "pro line" equipment. Eleven individual defendants are and at pertinent times were the President and members of the Park District's Board of Trustees, the Board Attorney, and administrative staff members of the Park District. Also defendants are Golf Shop Management, Inc., the current concessionaire of the pro shops at all five courses, and Gordon Ramsey, the concessionaire's sole incorporator. For present purposes, these last two defendants may be treated together (GSM).

On January 19, 1974, the Park District terminated plaintiffs' concession rights, and on February 20 of that year the Park District terminated plaintiffs' employment. On January 23, 1974, GSM was awarded pro shop concession rights at all of the Park District's five golf courses. The reasons for these events, and the manner in which they came about, are at the heart of this lawsuit.

The 1970 Illinois Constitution, Article IX, § 5, provided for the abolition of personal property taxes and authorized the

Illinois General Assembly to provide replacement revenue sources for local government units. The General Assembly has not exercised its power to create substitute revenues for local park districts. These facts, which we may and do judicially notice, apparently led the Park District in 1973 to consider the possibilities of obtaining greater revenues from its golf course pro shop concessions.

Plaintiffs had, for some time, been paying small concession fees; each paid only $600 yearly, except for one who was assigned only a nine-hole golf course and who paid only $300. In the late summer and fall of 1973, the terms of the concession agreements for that calendar year were revised in a confusing and apparently less than harmonious series of negotiations, with the result that plaintiffs agreed to pay 1½% of their gross receipts as a fee.

Also during the fall of 1973, GSM and members of the Park District Board and Staff agreed that GSM would make an economically unrealistic "sham" proposal, which would not be performed, to pay $90,000 a year for concession rights at the five golf courses.[2] Public bidding specifications tailored exclusively for GSM's "sham" proposal were designed and advertised, and on December 17, 1973, GSM formalized its $90,000 proposal as a bid. A Park District Board meeting scheduled for December 19 for the purpose of acting on received bids was never held.

Instead, in the language of the complaint,

> [f]rom, and after, December 17, 1973, GSM's $90,000 per year proposal . . . was coercively laced with the threat

[2] The plaintiffs do not explicitly allege an agreement or an understanding that GSM would not in fact pay an annual fee of $90,000. However, it is alleged that GSM would suffer net operating losses of at least $50,000 if it paid $90,000 yearly concession fees as promised. Also, the characterization of the proposal as being a "sham" would seem to imply a lack of bona fides insofar as an intent to carry out the terms and conditions of the proposal was concerned.

of non-renewal of plaintiffs' 1973 "leases" and summary termination of their proprietary business rights and used to induce them to raise, fix and maintain their retail, rental and service prices and pay a 5% of gross concession or "lease" fee to the PARK DISTRICT.

[The Park District defendants] used the GSM proposal, with GSM agreement, to coerce plaintiffs into a 5% sales taxing and price raising/fixing scheme.

. . . .

On January 16, 1974 the PARK BOARD declared that unless plaintiffs agreed to raise their resale, rental and services prices and pay 5% of the gross receipts before 8 a.m., Saturday, January 19, 1974, their proprietary concession rights would be awarded to GSM, Inc.

. . . .

The plaintiffs and each of them were not summarily terminated from their proprietary business and local governmental employment rights because of the expiration of their 1973 "leases" but because, on January 19, 1974, they refused to be coercively induced into levying unlawful 5% sales tax levies on their business consumers and because they refused to contract, combine or conspire with the effect of raising, fixing and maintaining their proprietary resale, rental and service prices contrary to Illinois and Federal antitrust laws.

The complaint also alleges that plaintiffs, even after their proprietary termintions, remained in possession of the pro shops, that they litigated the Park District's state court forcible entry and detainer suit, and that this assertion of their "rights" was the cause of their employment terminations. The Illinois Appellate Court determined that plaintiffs' defenses in that suit were not germane to the narrow question of their right to possess the pro shops and that plaintiffs' rights of possession ended at the expiration of their concession agreements on December 31,

1973. *Pleasure Driveway and Park District of Peoria v. Kurek*, 27 Ill. App.3d 60, 325 N.E.2d 650 (1975). The Illinois Supreme Court denied leave to appeal. A subsequent state court damages action by the Park District sought redress for plaintiffs' allegedly wrongful holding over of possession of the pro shops, and a judgment in the Park District's favor in the amount of $127,605 is apparently pending on appeal.

As a result of the defendants' wrongful conduct, the golfing public of Peoria is alleged to have lost the benefits of competition, suffered increased prices and all of the evils of monopolistic practices without any corresponding governmental or other benefits. Substantial injury to plaintiffs is claimed. Count I (antitrust) seeks declaratory and injunctive relief against all defendants and treble damages from all defendants except the Park District. Count II (civil rights) seeks damages from all defendants except GSM.

II

We turn to the question of whether Count I of the complaint fails to allege a cause of action under the antitrust laws. The standard we must apply is settled beyond dispute: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This rule has particular force in this case, where plaintiffs' motion to amend their complaint by adding a third count, which refined their antitrust theories and made some additional factual allegations, was denied by the district judge in a short decision and order.[3]

Before considering the difficult questions which this case

[3] The district judge characterized plaintiffs' motion as an attempt to relitigate "antitrust and constitutional violations which simply do not exist" and dismissed the possibility that a conspiracy existed as "pure fancy," although a conspiracy is plainly alleged both in the complaint he dismissed and in the amended complaint he denied leave to file.

requires us to answer, we note briefly several background matters. First, of course, we intimate no views whatsoever on the likelihood that plaintiffs will be able to prove the allegations of the complaint.[4] Also, the district court's judgment rests solely on the conclusion that the involvement of governmental action takes the case outside the scope of the antitrust laws. Without the benefit of a factual record, the district court's views, or briefing by the parties, we decline to address any broader question than that upon which the district court rested its decision.

Moreover, this case does not present the question of whether a public agency may grant a monopolistic concession license without violating the antitrust laws, where no more is alleged or proved. Nor does the case simply involve a public agency's attempt to increase operating revenues by increasing concession fees uniformly to its competing concession licensees. The case does involve both of these elements, the defendants urge us to decide the case as if it involved no more, and the district court, in dismissing the case, apparently accepted this characterization of the issues raised. But more than this is alleged by the complaint, which charges that the threat of a monopolistic license to GSM and the demand for uniformly increased fees were used by the defendants as means in a broader conspiracy to coerce plaintiffs into raising and fixing their retail prices and that the award of the GSM license was made to punish plaintiffs for refusing so to be coerced. Acts which may be legal and innocent in themselves, standing alone, lose that character when incorporated into a conspiracy to restrain trade. *See Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964); *Poller v. Columbia Broadcasting System, Inc.*, *supra*, 368 U.S. at 468-69.

[4] Nor do we consider the question of which, if any, of the asserted components of plaintiff's damages will prove to be recoverable under the Supreme Court's recent decision in *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, — U.S. —, 45 U.S.L.W. 4138 (Jan. 25, 1977).

III

We must initially determine whether the district court correctly stated the law to be that the activities of the Park District are outside the scope of the Sherman Act, either as a general matter or, at least, in the circumstances of this case. The district court based its conclusion on the "so-called state-action exemption,"[5] *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975), which was articulated in *Parker v. Brown*, *supra*, and its progeny.

In *Parker*, the state of California's program for prorating the state's raisin crop so as to reduce excess supply and stabilize prices, which program was found to be consistent with federal agricultural regulations and policy, was questioned as to its validity under the Sherman Act, 15 U.S.C. § 1 et seq. The defendants were some of those charged by law with operating the program. The Supreme Court, assuming that the program would violate the Act if it were implemented by private persons, concluded nonetheless that the Act was not intended to prohibit the prorate program, which

> derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control

[5] As the opinions of the Supreme Court, considered herein, have recognized, *Parker* announced no rule of antitrust *exemption or immunity;* rather, it determined that the Sherman Act was not intended to apply in the first place to the type of state-mandated activities there at issue. Other courts nevertheless have utilized the single-word shorthand references of "exemption" or "immunity."

over its officers and agents is not lightly to be attributed to Congress.

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

317 U.S. at 350-51. The anticompetitive effects of California's prorate program derived from "the state['s] command"; the state adopted, organized, and enforced the program "in the execution of a governmental policy." *Id.* at 352. This fact was repeatedly emphasized by the Court in its brief discussion of the antitrust issue and in its conclusion: "The state . . ., as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.*

Goldfarb v. Virginia State Bar, supra, presented the question "whether a minimum fee schedule for lawyers published by the Fairfax County [Virginia] Bar Association and enforced by the Virginia State Bar," 421 U.S. at 775, violated § 1 of the Sherman Act, 15 U.S.C. § 1. Because the Virginia State Bar was "a state agency by law," *id.* at 790 (footnote omitted), the Supreme Court addressed the State Bar's claim, based on *Parker,* that the Sherman Act did not apply to it, and rejected the claim, without dissent. The Virginia legislature had empowered the Supreme Court of Virginia to regulate the practice of law and had authorized a role for the State Bar in that regulation as an administrative agency of the Supreme Court. The state Supreme Court had developed ethical rules for lawyers, and the State Bar was empowered to issue ethical opinions on the application of the rules. Two such opinions were an important part of the State Bar's role in enforcing minimum fee schedules.

An expansive reading of some of the language in *Parker* would have suggested that the Sherman Act could not be applied to the State Bar in these circumstances, but the Supreme Court took a closer look. Because no Virginia statute referred

to lawyers' fees and the Supreme Court of Virginia had taken no action requiring the use of and adherence to minimum fee schedules, it could not be said that the anticompetitive effects of minimum fees were "compelled by direction of the State acting as a sovereign."*Id.* at 791. The State Bar, although it acted within the scope of its general powers, had "voluntarily joined in what [was] essentially a private anticompetitive activity," *id.* at 792, and was not executing the mandate of the state. The Court stated that the existence of sovereign compulsion was "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe" and there was, thus, no reason to take the matter any further. *Id.* at 790.

After the district court dismissed the present lawsuit, the Supreme Court decided *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976), which also bears upon the issues in this case. In *Cantor,* an electric utility, regulated by the state of Michigan, operated a program which provided "free" light bulbs to electricity customers, the costs of the program being covered by the utility's general electricity rates. An independent seller of light bulbs charged antitrust violations, and the utility defended on the theory, based on *Parker,* that the light bulb program was included in its rate tariff filed with and approved by the state Public Service Commission and that state law required it to follow the terms of the tariff as long as it was in effect. Six Justices agreed that summary judgment for the utility based on *Parker,* had been improperly entered.[6]

Cantor, of course, did not present the precise question addressed in *Parker* and at issue here, for in *Parker* state officials executing a state program were the defendants while in *Cantor* a private party sought to rely on state law to insulate its con-

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[6] Mr. Justice Stevens delivered the Court's opinion, joined in whole by Justices Brennan, White, and Marshall, and in substantial part by the Chief Justice. *Id.* at 603. Mr. Justice Blackmun concurred in the result. *Id.* at 605.

duct from antitrust liability. The considerations applicable to each case are necessarily less than identical. While the Court did not develop a single opinion expressing the views of a majority of its members, *see* note 6 *supra*, a majority did agree that analysis of a private party's state law defense requires consideration of whether it would be fair to subject a party to antitrust liability when he may have been caught between inconsistent commands of his state and federal sovereigns, and of factors akin to those used to determine whether federal agency regulation of a business produces an implied antitrust immunity.

In deciding *Cantor*, the Court majority emphasized the facts that no Michigan statutes purported to regulate the light bulb industry, that neither the Michigan legislature nor the Public Service Commission had ever specifically looked into the question of the desirability of a "free" light bulb program, and that other utilities regulated by the Commission did not have such a program. The Court majority concluded therefrom that the Commission's approval of the utility's program did not "implement any statewide program relating to light bulbs" and that "the State's policy is neutral on the question whether a utility should, or should not, have such a program." 428 U.S. at 585. That conclusion was central to the Court's disposition of the case.

Because a private actor's state law defense is at least related to a governmental body's assertion of a "state action" defense, we think the *Cantor* Court's emphasis on the lack in that case of a "statewide program" or a state policy sheds some light on the present case. We also think that *Cantor*, read with *Goldfarb*, provides important general guidance on the question of what it means to find governmental action involved in the facts of an antitrust suit.

Cantor and *Goldfarb* demonstrate beyond serious questioning that the Supreme Court is not inclined any longer, if it

ever was, to accept superficial and mechanical application of a *Parker*-based "rule" that antitrust inquiry ends upon such a finding of governmental actions or laws being involved. In the years after *Parker* and before *Goldfarb* and *Cantor*, there was a tendency in many of the reported decisions to apply *Parker* broadly and to use rather general language in so doing. For example, addressing the distinct question of whether persons may join together attempting to induce governmental action with anticompetitive effects, *see* part V of this opinion, *infra*, the Supreme Court stated as a building-block proposition that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, 365 U.S. at 136. In the same context, this court's opinion in *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 227 (7th Cir. 1975), used similarly broad language. Neither case involved a claim of governmental action violative of the Sherman Act, the facts of both cases were meaningfully different than those presented here, and we have, thus, no occasion to question whether the language used accurately stated the law as applied to those cases. We point out, however, that *Goldfarb* and *Cantor* undercut the validity of any such simple one-sentence "rule" as a general proposition.

We turn, then, to the instant complaint, and conclude that *Parker* and its progeny do not support the district court's dismissal thereof. The fact that the governmental body sued here is a park district, with substantially less than statewide jurisdiction, has significance. First, it is clear that subordinate units of government—notwithstanding that they derive their powers from a state—are not entitled to all of the federalistic deference that the state would receive. *See, e.g.*, in the area of the Eleventh Amendment to the Constitution, *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974). More specifically, where there are numerous subordinate units of government of a given type,

each of the same status under state law, it is more difficult to say that the actions of any one of them are undertaken pursuant to "the state['s] command," *Parker, supra,* 317 U.S. at 352, or that "[t]he state . . ., as sovereign" imposed any anticompetitive restraints resulting from such actions. *Id. Goldfarb* established that Sherman Act suits against state agencies may be maintained unless the conduct challenged is "compelled by direction of the State acting as a sovereign," 421 U.S. at 791, and the numerosity and potential variety of practices of subordinate units of government may often suggest that "the State's policy is neutral" on any given practice and that there is no "statewide program" which would require the sort of comity-based respect evident in *Parker. See Cantor, supra,* 428 U.S. at 585.

We surely do not wish to be understood as saying that park districts and other subordinate governmental units may no longer avail themselves of a *Parker* defense to antitrust suits. Rather, we advert to the fact that a subordinate governmental unit's *Parker* claim is less obviously justified than is the same claim made by a state government, and we conclude that antitrust "immunity" in the former case cannot be automatic. Both the Third and the Fifth Circuits have recently so held. *City of Lafayette, Louisiana v. Louisiana Power & Light Company,* 532 F.2d 431 (5th Cir. 1976), *cert. granted,* — U.S. —, 45 U.S.L.W. 3647 (No. 76-864, March 28, 1977) (two cities); *Duke & Company Inc. v. Foerster,* 521 F.2d 1277 (3d Cir. 1975) (three municipal corporations and a county commissioner); and *cf. Hecht v. Pro-Football, Inc.,* 444 F.2d 931 (D.C. Cir. 1971) *cert. denied,* 404 U.S. 1047 (1972) (unincorporated instrumentality of the District of Columbia).

We realize that in the case of *State of New Mexico v. American Petrofina, Inc.,* 501 F.2d 363, 370 n.15 (9th Cir. 1974), involving antitrust counterclaims against a state and some of its political subdivisions, the Ninth Circuit has held to the contrary. *State of New Mexico* was, however, decided before *Goldfarb*

and *Cantor* and we do not believe its holding as to subordinate units of government survives the test of their analysis. We simply see little sense in automatically treating as state mandates the activities of local governmental units when these activities may vary substantially from unit to unit and may be wholly lacking in any express or implied state authorization or command.

We agree with the Third and Fifth Circuits that an adequate state mandate for anticompetitive activities of subordinate governmental units "may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity." *Duke & Company Inc., supra,* 521 F.2d at 1280; *accord, City of LaFayette, supra,* 532 F.2d at 434-35. The latter case properly notes that "all evidence which might show the scope of legislative intent" should be considered. *Id.* at 435 (footnote omitted).

Nothing in the Illinois statutory provisions governing park districts even remotely suggests that Illinois has authorized, let alone compelled, park districts to attempt to enrich themselves by coercing horizontal retail competitors operating under concession licenses to fix retail prices in what would otherwise be plain violation of the Sherman Act. Park districts are, of course, empowered to "construct, equip and maintain . . . golf . . . courses," Ill. Rev. Stat. 1975, ch. 105, § 8-10, as well as "necessary facilities pertinent thereto . . .." *Id.*, § 9.1-1. Power is also given for park districts "to contract in furtherance of any of [their] corporate purposes," *id.* § 8-1(a), and "to lease real estate," *id.*, § 8-16. We think these provisions fully authorize the Park District to operate pro shops at its golf courses or to make contracts or leases allowing outside parties to operate such shops. If the complaint in this lawsuit alleged no more than that the Park District had substantially reduced relevant, com-

petition by operating the shops itself, foreclosing others,[7] or by determining that the "corporate purposes" of the District would be best served by contracting with a single concessionaire for the operation of the shops,[8] the case for a *Parker* defense would be stronger than it is here. That the Park District's conduct concerned its golf courses and involved its statutory powers to contract and/or to lease surely does not convert Illinois' grant of such powers into state authorization or mandate to use them to force private competitors to violate the antitrust laws.

This conclusion is strengthened by the complaint's allegations that the Park District, in demanding 5% of gross sales as a concession fee and requiring as a condition of concession renewal that plaintiffs raise and fix their prices, presumably to cover the 5% fee, was effectively attempting to impose on the Peoria golfing public a 5% hidden sales tax that is illegal under Illinois law. We note that the Park District's revenue powers are limited to the levying of various property taxes, Ill. Rev. Stat. 1975, ch. 105, § 6-1 et seq., and the charging of fees for the use of District facilities, *id.*, § 8-1(h), and we are aware of no authority that would authorize the Park District effectively to double the sales taxes currently in force in Illinois. If it can be proven that the concession fee's intended incidence would have operated as an illegal sales tax, it would be extremely difficult, if not impossible, to find a state mandate underlying the

[7] *Ladue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F.2d 131 (8th Cir. 1970); and *Continental Bus System, Inc. v. City of Dallas*, 386 F. Supp. 359 (N.D.Tex. 1974), both relied upon by defendants, are cases of this type.

[8] *E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947; and *Murdock v. City of Jacksonville, Florida*, 361 F. Supp. 1083 (M.D.Fla. 1973), fall into this category, and *Metro Cable Co., supra*, while distinguishable, is analogous. Although these cases and those cited in n. 7 *supra* were all decided before *Goldfarb* and *Cantor*, we may assume without deciding that the Sherman Act does not apply to these types of less-than-statewide governmental action.

Park District's alleged conduct.[9] For this reason and the others indicated, we believe the district court improperly dismissed the antitrust claim against the Park District.

IV

The analysis set out in part III of this opinion applies directly only to the Park District. In *Parker, supra*, and in some cases applying it, however, officials of governmental units were sued, as is the case here, and it has generally and sensibly been held that where the activities of a governmental unit are outside the scope of the antitrust laws, the officials charged with performing those activities enjoy the same protections. *See Parker, supra*, 317 U.S. at 350-51; *E. W. Wiggins Airways, Inc., supra*, 362 F.2d at 56; *Murdock v. City of Jacksonville, Florida, supra*, 361 F.Supp. at 1093-94. Even in such cases, however, it has sometimes been recognized that an official's actions ultra vires or in bad faith might present a different question. *Id.*

Neither in the district court nor in this court have the individual defendants associated with the Park District made any argument that they should be entitled to protection from antitrust liability even if the District was not. We see no *a priori* reason to determine, at this stage in the litigation, that such additional protection would or would not be justified. *See Duke & Company Inc., supra*, where the Third Circuit reversed a dismissal in favor of three municipal corporations *and* a county commissioner after determining that *Parker* did not protect the governmental unit defendants. Accordingly, we reverse the district court's judgment in favor of the individual Park District defendants. We do not mean to imply thereby that some or all of these defendants may not be able to establish some sort of good faith defense, for neither facts nor legal argument in support of such

[9] Such proof, of course, would add nothing directly to the merits of plaintiffs' antitrust claims and would be germane only to the question of state mandate.

a defense are before us. Nor do we suggest, even if some sort of good faith defense might be cognizable in appropriate cases, that proof in support of the complaint's allegations of bad faith and official actions illegal under state law might not operate to vitiate the defense in this case.

V

We turn to GSM's contention, accepted by the district court, that its involvement with the facts of this case was limited to seeking the award of a governmental contract and accepting its benefits and obligations once awarded, and that the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra,* and its progeny, protects GSM from antitrust liability. In *Noerr,* the Supreme Court held that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135. Three reasons for this rule were articulated. First, the Court found no Congressional purpose to regulate "political activity," and noted that an "essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act" counseled against construing the Act to apply to the former case. *Id.* at 136-37. Second, antitrust liability in such a case could reduce the flow of information on which governments depend and could, thus, impair their ability to take actions that operate to restrain competition, which ability was recognized in *Parker,* supra. Id. at 137. Third, "such a construction of the Sherman Act would raise important constitutional questions" because it would impute to Congress an intent to invade the First Amendment right of petition. *Id.* at 138. The Court recognized that Sherman Act liability might be justified where conduct "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . .". *Id.* at 144. Because the *Noerr* defendants were "making a genuine effort to influence legislation and law enforcement practices," *id.,* no such argument was possible in that case.

Noerr was followed in *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965), where joint labor-management inducements to the Secretary of Labor and the Tennessee Valley Authority to take action injurious to small coal operators were involved. The Court stated that

> [j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

Id. at 670.

In *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), the Court extended the *Noerr-Pennington* rule to attempts to influence administrative agencies and judicial proceedings. Because, however, the motor carrier defendants used universal resistance to competitors' applications for new operating authority to achieve their primary purpose of deterring the making of such applications, thereby injuring competitors not through governmental action but directly, the case was held to fall within Noerr's "sham" exception.

The district court accepted GSM's argument that its role in the case was solely that of the successful bidder for the Park District's pro shop concessions. We may assume arguendo that if the complaint alleged no more, GSM could not be found liable under the antitrust laws. We are inclined to the view that nonliability in such a case would flow from the fact that successful bidding does not violate the antitrust laws substantively, *cf. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 508 F.2d 547 (1st Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975), rather than from the principles of *Noerr,* which seem

to address a different question.[10] Perhaps more to the point would be the decision of this court in *Metro Cable Co. v. CATV of Rockford, Inc., supra,* substantially relied upon by GSM, where defendant obtained the first granted cable television license in a city and successfully induced the city council not to license a potential competitor; this court found that *Noerr* and its progeny foreclosed antitrust liability.

Neither the successful bidder hypothetical nor *Metro Cable,* however, involve what is alleged here. The complaint asserts that GSM made an economically unrealistic "sham" proposal, not actually to be put into effect, in concert with at least some Park District officials, knowing that the proposal would not be acted upon as indicated in the bid invitation but would, instead, be used by the Park District to coerce plaintiffs into conduct violative of the antitrust laws. If these allegations can be proved, and we must assume at this point that they can, the *Noerr* doctrine would provide no defense. This is so for several reasons.

First, except for the fact that GSM's agreement and conduct were in conjunction with governmental officials it cannot be said that there is an "essential dissimilarity" of the sort that troubled the Court in *Noerr,* 365 U.S. at 136-37, between GSM's conduct and activities traditionally held violative of the Sherman Act. *Albrecht v. Herald Co.,* 390 U.S. 145 (1968), is illustrative.

In *Albrecht,* the defendant newspaper publisher had attempted to coerce plaintiff, one of its independent home delivery carriers, into compliance with a resale price fixing scheme violative of

[10] *See Hecht v. Pro-Football, Inc., supra,* 444 F.2d at 940-42; and *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F.2d 25, 32-34 (1st Cir. 1970), *cert. denied,* 400 U.S. 850, both of which take the position that the rationale of *Noerr* and progeny is directed to attempts to influence some significant governmental policy determination and not a government's actions as a commercial entity.

the Sherman Act. Defendant had argued, *inter alia,* that its actions, which included termination of the carrier, were wholly unilateral and did not establish any conspiracy or combination within the meaning of the Act. The Supreme Court disagreed, and overturned a jury verdict in defendant's favor because it was "clear that a combination in restraint of trade existed." *Id.* at 154. The only combination presented by the record and considered by the Court is quite like that which, as pertinent to GSM, is alleged here. Specifically, to put pressure on the plaintiff carrier, the defendant hired a subscription solicitation company to seek customers from plaintiff's delivery route for a new route. Twenty-five percent of plaintiff's customers agreed to switch carriers. The defendant then gave these customers to another carrier who knew that he would have to follow defendant's resale price policies and that he might have to return the customers to plaintiff if plaintiff acceded to the policies. The defendant's combination with the solicitation company and the new carrier who lent their business efforts to defendant's attempts to coerce the plaintiff into an antitrust violation supported Sherman Act liability.[11] The parallel to this case is obvious, as is the conclusion that GSM's alleged conduct is not essentially dissimilar to activities the Sherman Act was meant to proscribe.

Nor is the fact that GSM combined or conspired with governmental officials dispositive, for both of *Noerr's* premises with respect to that point are undercut by the factual setting of this case. Our determination that the Park District and its officials had no state mandate or authority to engage in the activities attacked here necessarily reduces the applicability of the reasoning of

[11] Of course, only the newspaper publisher was sued in *Albrecht,* and it is at least possible that had the solicitation company and the new carrier been sued a defense based on their "insubstantial . . . connection with the restraint" might have been established. *See Goldfarb, supra,* 421 U.S. at 791 n. 21. On the present complaint, there is no occasion for us to decide if such a defense might be developed in subsequent proceedings here.

Noerr to the degree it is based on the need of governmental units for citizen input in making decisions that *Parker* holds to be outside the scope of the Sherman Act. *See Duke & Company, Inc., supra,* 521 F.2d at 1282. The *Noerr* decision also rests on a refusal to impute to Congress an intent to invade the constitutional "right of the people . . . to petition the Government *for a redress of grievances.*" U.S. Const., Amendment I (emphasis added). We have some difficulty understanding how a contract proposal to a governmental unit falls within the ambit of that right, *see* note 10 *supra,* but even if it does, we think it clear that agreement with government officials to pressure others into an antitrust violation does not.

Alternatively, another basis for finding *Noerr* protections inapplicable at this stage of the proceedings is that facts provable under the complaint could well establish that GSM's concession proposal was a "mere sham" within the meaning of that decision. 365 U.S. at 144. We are not prepared to say that this conclusion would inexorably follow upon the sole proof that the proposal was economically unrealistic, *see Noerr, supra,* 365 U.S. at 140-42; *Metro Cable, supra,* 516 F.2d at 231; *but see Woods Exploration & Production Company, Inc. v. Aluminum Company of America,* 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972), but the economically unrealistic nature of the proposal, alleged to have been known to Park District officials, might support an inference that GSM was not "making a genuine effort," *Noerr, supra,* 365 U.S. at 144, to obtain the concession rights but was instead lending its support to the Park District's attempted coercion of plaintiffs' pricing policies. The complaint is somewhat inconsistent in this regard, alleging as it does both that GSM's purpose was to obtain monopolistic concession rights and that GSM knowingly made its proposal to pressure plaintiffs into agreements which, if made, would have foreclosed the concession rights to GSM. Proof of the latter assertion, however, could establish a sham and take the case out of the *Noerr* doctrine even if that doctrine applied, which we have decided it does not.[12]

VI

Count II of the complaint alleges deprivations of the plaintiffs' civil rights under color of state law and is based on 42 U.S.C. § 1983. The district court dismissed Count II because, in its view, previous state court decisions based on the same operative facts had resolved dispositive facts adversely to plaintiffs. On appeal, plaintiffs attack this dismissal only with respect to the complaint's charge that plaintiffs were summarily terminated from their public employment positions because they asserted their rights of petition and to due process by litigating their defenses to the Park District's forcible entry and detainer action. Moreover, plaintiffs agree that the Park District was properly dismissed out as a defendant even as to this charge. Accordingly, we affirm the district court's judgment insofar as it dismisses the other allegations in Count II and dismisses the Park District as a Count II defendant.

With regard to the employment termination claim against the President, trustees, attorney, and staff of the Park District, we must reverse. The district court based its dismissal of this claim on the following finding of Illinois Circuit Court Judge Iben in the Park District's damages lawsuit against the golf professionals:

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[12] Defendants' suggestion that the "sham" exception operates only in a judicial setting is specious. The Supreme Court articulated the exception in the context of the *Noerr* facts, which in no way involved judicial settings. Nor does this court's determination in *Metro Cable, supra,* 516 F.2d at 228, that the existence of a judicial setting authorizes a somewhat broader inquiry into the "sham" issue even remotely support such a proposition.

> [T]he reason for their termination clearly appears to have been the Defendant's[sic] [plaintiffs herein] insistence on remaining in the golf shop premises. There is abundant evidence that they stubbornly and intractably insisted through litigation, and other ways, on this claim, spurning other avenues. They can have no doubt about the reason for their discharge, i.e., their refusal to give up the premises.

Pleasure Driveway and Park District of Peoria v. Kurek et al., No. 75 L 2893 (10th Judicial Circuit, Peoria County, Nov. 14, 1975). This finding was made with reference to the golf professionals' counterclaim allegation that their employments were summarily and unlawfully terminated.

We have no quarrel with the proposition that if Judge Iben's finding had disposed of the claim made here or had determined adversely to plaintiffs a fact critical to success on this claim, relitigation in the federal courts would be barred. *See Reich v. City of Freeport*, 527 F.2d 666 (7th Cir. 1975); *Phillips v. Shannon*, 445 F.2d 460 (7th Cir. 1971). The fact that the remaining defendants under Count II were not parties or privies in the state court suit would, of course, make the doctrine of res judicata inapplicable, but it would not preclude defendants' defensive reliance on collateral estoppel. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

Nor would it matter that Judge Iben's decision has apparently been appealed,[13] for

> the federal rule is that the dependency of an appeal does not suspend the operation of an otherwise final judgment

[13] Our record does not reflect the pendency of an appeal in the state court case, but the brief of the defendants who seek to rely on the state judgment represents this to be the case, and we take that representation as a judicial admission of the fact.

> as . . . collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo.

1B Moore's Federal Practice ¶ 0.416[3], at 2254 (2d ed. 1974); *Grantham v. McGraw-Edison Company*, 444 F.2d 210, 217 (7th Cir. 1971). Illinois follows the same rule. *Sixty-Third & Halsted Realty Co. v. Goldblatt Bros.*, 342 Ill. App. 389, 96 N.E.2d 838 (1951), *aff'd*, 410 Ill. 468, 102 N.E.2d 749.

We do not agree with the district court, however, that Judge Iben's finding disposed of plaintiffs' claim herein or of critical facts pertinent to it. Illinois' Forcible Entry and Detainer Act, Ill. Rev. Stat. 1975, ch. 57 § 1 et seq., plainly gives a tenant the right to remain in possession of property while litigating the question of his possessory rights. Judge Iben's determination that plaintiffs were terminated in their employments because they insisted on remaining in possession of the pro shops implies, to some extent at least, that the employment terminations occurred because plaintiffs chose to litigate their rights to possession. In fact, the finding expressly refers to plaintiffs' insistence "through litigation, and other ways" on asserting their claims to possession. Nothing in this state court judgment supports the district court's conclusion that it had been previously adjudicated that "the exercise of the right to litigate issues" was not the reason for plaintiffs' employment discharges. No other issues pertinent to Count II of the complaint were decided below or asserted in this court, so we reverse the district court's judgment of dismissal insofar as it concerns the employment discharge claim against the individual Park District defendants.

For the reasons stated herein, the judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Plaintiffs have requested that the provisions of Circuit Rule 18 be applied on remand. We believe that the interests of justice would best

be served, in the circumstances of this case, by granting that request. It is so ordered.

AFFIRMED IN PART;

REVERSED AND REMANDED IN PART.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 76-1791

William Kurek, et al.,

Plaintiffs-Appellants,

v.

Pleasure Driveway and Park District of Peoria, Illinois, et al.,

Defendants-Appellees.

On Motion for Injunctive Relief

Submitted December 30, 1977—Decided March 17, 1978

Before Fairchild, *Chief Judge*, Pell and Sprecher, *Circuit Judges*.

Pell, *Circuit Judge*. This litigation has been brought before this court again by virtue of the plaintiffs-appellants' (hereinafter "golf pros") motion for injunctive relief, the defendants-appellees' (hereinafter collectively "park district") response thereto and the golf pros' opposition to the response. The relief sought at this time from this court is the enjoining of the park district from enforcing and collecting a state court judgment in the amount of $127,605.

We are confronted with difficult problems, including our jurisdiction to act in the premises; the applicability of Rule 8,

Fed.R.App.P., and the injunctive relief provision of Section 16 of the Clayton Act (15 U.S.C. § 26), upon which the golf pros rely; the applicability of the anti-injunction act (28 U.S.C. § 2283), and policies of federalism and comity, upon which park district relies; and a potpourri of miscellaneous issues such as res judicata, full faith and credit, suretyship, and general principles of equity.

To put these matters in perspective we must briefly set forth a summary of prior litigation. The state litigation, being basically in the nature of forcible entry and detainer proceedings which resulted in the monetary judgment is reported as follows: *Pleasure Driveway and Park District of Peoria v. Kurek*, 27 Ill. App. 3d 60, 325 N.E. 2d 650 (1975); *Pleasure Driveway and Park District of Peoria v. Jones*, 51 Ill. App. 3d 182, 367 N.E. 2d 111 (1977). The Illinois Supreme Court summarily denied golf pros' petition for leave to appeal the damage judgment on November 23, 1977, and the mandate was returned to the state appellate court and eventually, on December 20, 1977, to the state trial court.

The federal antitrust litigation is reported: *Kurek v. Pleasure Driveway and Park District of Peoria, Illinois*, 557 F.2d 580 (7th Cir. 1977). Subsequent to the denial of rehearing in that case on August 11, 1977, park district moved this court to stay its mandate, which motion was granted on August 22, 1977. Two days later golf pros filed their response to the motion to stay mandate, objecting to the granting thereof and asking as an alternative matter in the event the motion were to be granted that park district be enjoined from enforcing the state court judgment. Treating the response as a motion to reconsider, this court denied the motion, but with regard to the alternative relief stated the following:

> Plaintiffs-appellants' request for alternative relief is premature since it does not appear that the enforcement and collection of the state court judgment is imminent. The parties are directed, however, to notify the court of any collection efforts made while the mandate resides in the Seventh Circuit. Accordingly, the request for alternative relief is DENIED at this time.

Petition for certiorari in the Supreme Court of the United States was timely filed by park district, No. 77-440, 46 U.S. L.W. 3221 (Sept. 19, 1977), which pursuant to Rule 41(b), Fed.R.App.P., had the effect of continuing the stay of the mandate of this court. Subsequently, on December 21, 1977, park district advised a judge of this court by letter as follows:

> The Illinois Supreme Court issued its mandate in that action and subsequently the Appellate Court issued its mandate to the Trial Court. There had been no other proceedings in this matter, and no supersedeas or stay of proceedings has been requested or entered as of this date. An appeal bond, with personal sureties, was provided by the golf pros. In order to avoid the charge that the sureties were released from their surety obligation because the Park District did not take prompt action, collection and enforcement proceedings must begin promptly. These sureties are not parties before this Court and are not bound by the disposition of the federal litigation, and they might claim release in the event enforcement efforts are not timely made. It is, therefore, our intent to proceed in a prompt manner to enforce the final judgment of the Illinois Court against the golf pros.

The motion presently before this court followed park district's letter.

The Supreme Court has taken no action on the pending petition for certiorari. Park district has not challenged in this posture the jurisdiction of this court to rule upon the motion for injunctive relief. We are of the opinion that upon a proper showing, at least in the absence of the granting of certiorari in the Supreme Court, this court could grant the injunctive

relief request. *See Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 78 F. 659 (D. Ky. 1897); *cf. Waskey v. Hammer*, 179 F. 273 (9th Cir. 1910).

Golf pros, from the point of view of policy desirability of all facets of a common controversy between parties being fully concluded before one of those parties is required to pay the other a substantial sum of money, make an appealing case. They also point out that in the event of their ultimately prevailing in the federal antitrust litigation, the amount of the state court judgment, if it is enforced and collected, could very possibly be the basis of a triple damage judgment against the park district defendants. Golf pros express no lack of confidence in their ability ultimately to prevail. We express no opinion except that they probably have a long and tortuous roadway ahead of them. Also, golf pros point out the lack of harm to park district in that the injunction, if granted by this court, could be conditioned upon the supersedeas bond which is presently in full force and effect as security for the state court judgment. It is to be noted at this point that golf pros provide us no authority to the effect that the sureties would not be released from their surety obligation of the supersedeas bond by virtue of the park district not taking prompt collection action and enforcement proceedings. We have done no independent research on this matter.

Golf pros in the present proceeding primarily rely upon claimed irreparable harm if the monetary state court judgment is collected and assert that under Rule 8, Fed.R.App.P., and Section 16 of the Clayton Act this court should grant the injunctive relief. The park district in addition to relying upon the anti-injunction act, 28 U.S.C. §2283, argues that this court is required to give full faith and credit to the judgment entered by the Illinois courts which the golf pros have not attempted to have reviewed by the United States Supreme Court. Golf pros counter that it would have been futile to have attempted to take the Illinois action to the United States Supreme Court

inasmuch as the Illinois Supreme Court's action was discretionary and there was no federal question involved. Again, complicating the issues is the fact that at one time in the litigation in the state courts golf pros attempted to assert the antitrust defense which was severed for trial and eventually golf pros were judicially prohibited from proceeding in the Illinois courts on this. It is uncertain whether this phase of the matter could have been a more promising basis for an attempt to secure certiorari. In any event, no attempt was made to review the Illinois state court proceedings beyond the state court system. Both parties have briefed extensively as to whether there are antitrust violations involved in the actions of park district. However, as the matter presently stands, unless this court's decision is reversed in the Supreme Court, the golf pros will have an opportunity to attempt to demonstrate in the district court such violations. We express no opinion further than that, however, as to the success of that effort.

Because of the result we reach in the present matter we do not deem it necessary to consider the full faith and credit argument. Neither of the parties have furnished us any authority on the subject. We instead turn to the anti-injunction statute which in its plain language, unless one of the two statutory exceptions is present, would require us to refrain from granting an injunction in the present case. *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), leaves no doubt that the plain language, barring the existence of one of the statutory exceptions, means exactly what it says.

One essential issue for disposition here shapes up then under the anti-injunction act being whether the present case would come under either of the exceptions of the act: first, whether the injunction provisions of the Clayton Act are to be construed as an express authorization by Congress permitting a stay of proceedings in a state court or, second, whether an injunction

here would be necessary in aid of federal jurisdiction or to protect or to effectuate the judgment of this court.

We note initially that other courts when presented analogous situations have denied injunctions without finding it necessary to determine whether the antitrust laws constitute an exception to the anti-injunction statute. Thus in *Response of Carolina v. Leasco Response, Inc.*, 498 F.2d 314 (5th Cir. 1974), *cert. denied*, 419 U.S. 1050, the court found there was no reason for granting an injunction where recovery in the state court proceedings is premised on an obligation collateral to but independent of the agreement which violates the antitrust law and where it is not necessary for the state court in granting relief to depend on or enforce the agreement violating the antitrust provisions, there being under those circumstances, according to the court, no illegality to bar the state suit. *Id.* at 319.

In *R & J Sales, Inc. v. Siesta Sleep Shop, Inc.*, 385 F. Supp. 202 (D.Mass. 1974), the court in denying an injunction observed that the state summary proceedings did not seek to enforce conduct complained of as violative of the antitrust laws, nor were they intended to compel adherence to illegal practices. Instead they merely sought to enforce a contractual right given in a lease and triggered by the termination of the franchise agreement for non-payment of franchise fees. The court also relied upon policies of comity and federalism.

We are of the opinion that the rationales developed in these two cases might well be those which we should apply here in denying an injunction. We now, however, have a later pronouncement on the general subject from the Supreme Court in *Vendo Co. v. Lektro-Vend Corp.*, — U.S. —, 45 U.S.L.W. 4971 (June 29, 1977), to which we now turn.

Both parties in the present case rely upon *Vendo*. Unfortunately, guidance for us in the present situation is not as clear as it might be in view of the three-two-four division of the Court

there.[1] While the plurality opinion does indicate that the Clayton Act injunction provision does not constitute an express Congressional authorization that would constitute an exception to the anti-injunction act, four justices in the dissenting opinion clearly think there would be such an exception, and two more justices in the concurring opinion express the opinion that at least sometimes there would be authority under the Clayton Act to enjoin state court proceedings despite the anti-injunction act, although in the present case before the Court these two justices did not deem that it was appropriate for an injunction to be granted.

Reading the opinions as indicating that at least if the exceptional circumstances described in the concurring opinion are made out, this court could grant an injunction under the Clayton Act, we are not pursuaded that such circumstances have been shown here. Mr. Justice Blackmun writing for himself and the Chief Justice referred to a pattern of baseless repetitive claims or an abuse of the state adjudicative process as a prerequisite to issuance of an injunction. He found that Vendo was not using the state court proceedings as an anticompetitive device in and of itself. In the case before us the golf pros attempt to show us that this was done and suggest strongly that park district misled the Illinois courts. We decline, however, to give credence to these conclusionary assertions. Golf pros at all times participated in the state proceedings and although some ex-parte rulings were made, golf pros were there given an opportunity to, and did, seek to set aside the challenged rulings. There is no showing that there was a failure of due process in the picture which has been presented to us. The state litigation which was vigorously contested appears to us to come within the ambit of Mr. Justice Blackmun's finding in *Vendo* that the state court

[1] Although we do not deem it necessary to consider the applicability of principles of comity and federalism aside from the anti-injunction statute issue, we do not find clear guidance because of the decision in *Vendo* as to the extent to which such principles should be applied in the present situation.

proceedings were not an anti-competitive device in and of themselves.

With regard to the second possible exception of the anti-injunction act, we do note the language in the plurality opinion to the effect that no case of the Supreme Court has ever held that an injunction "to preserve" a case or controversy fits within the "necessary in aid of its jurisdiction" exception nor did the parties direct the Court to any federal court decisions so holding. 45 U.S.L.W. at 4977. We advert to this in view of what is apparently the principal underlying contention of golf pros that the collection of the monetary judgment will be crippling in its financial drain to their continuing in the litigation. This is not expressly stated but seems to be implicit in the extended attempt to show us that golf pros were the subject of an antitrust conspiracy, much of which matter is still in the stage of assertion and has not reached the stage of the difficult proof entailed.

Notwithstanding our sympathy for the position in which golf pros find themselves in this ongoing litigation, we must conclude that it would be inappropriate for us to grant the injunction. Accordingly, the motion of the plaintiffs-appellants is denied.

Fairchild, *Chief Judge*, concurring. In this case, appellants (hereinafter referred to as "golf pros") seek an injunction against the enforcement of a final state court judgment. I find it difficult to distinguish this attempted process from a review of the state court judgment. *See Atlantic C. L. R. Co. v. Engineers*, 398 U.S. 281, 287, 293, 296 (1969). As a general rule, the lower federal courts are without jurisdiction to review final state court judgments absent some recognized ground for collateral attack such as habeas corpus. The only federal forum for review of state court judgments, unless some basis exists for collateral attack, is the Supreme Court.[1] *See, e.g., Warriner v. Fink*, 307 F. 2d 933, 936 (5th Cir. 1962). *Cf. Adkins v. Underwood*, 520 F.2d 890, 892 (7th Cir. 1975).

[1] I recognize that the Supreme Court in *Vendo Co. v. Lektro-Vend Corp.*, 97 S.Ct. 2881 (1977), assumed without deciding that there may be situations where a federal court can issue an injunction against enforcement of a final state court judgment. Petitioner in *Lektro-Vend* argued that the federal courts were required to give full faith and credit to a final state court judgment; however, this question was not presented in the petition for certiorari and was not passed upon by the Court. 97 S.Ct. at 2886 and n.4.

Lektro-Vend was a case which originated in this circuit. Had I been on the panel when it was here, my reluctance for review by a a lower federal court of a final state court judgment would probably have caused me to dissent.

Assuming that we might have some jurisdiction to enjoin enforcement of the state court judgment but for the Anti-Injunction statute, golf pros argue that § 16 of the Clayton Act, as interpreted by *Vendo Co. v. Lektro-Vend Corp.*, 97 S.Ct. 2881 (1977), constitutes an expressly authorized exception to the Anti-Injunction statute under the facts of this case. As I read *Lektro-Vend*, however, proceedings in state court can only be enjoined under § 16 if those proceedings are part of a "pattern of baseless, repetitive claims." 97 S.Ct. at 2894 (Blackmun, J., concurring)[2] Since the present case involves one action brought in state court which resulted in final judgment in favor of the park district, it certainly cannot be said that Park District engaged in a "pattern of baseless, repetitive claims." I agree with the majority that no other exceptions to the Anti-Injunction Act are applicable.

I therefore concur in the denial.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[2] Because of the 3-2-4 division of the Court in *Lektro-Vend*, the concurring opinion of Justice Blackmun was decisive. The "pattern of baseless, repetitive claims" standard is derived from *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), where the Court stated that such use of the adjudicatory process could constitute a violation of the antitrust laws.

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 11, 1977

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. James L. Foreman, District Judge*

William Kurek, et al., Plaintiffs-Appellants, v. Pleasure Driveway and Park District of Peoria, Illinois, an Illinois Political Subdivision, et al., Defendants-Appellees.	Appeal from the United States District Court for the Southern District of Illinois, Peoria Division
No. 76-1791	No. P Civ. 76-9
	Robert D. Morgan, Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Pleasure Driveway and Park District of Peoria, Illinois, defendant-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* Honorable James L. Foreman, Judge, United States District Court for the Eastern District of Illinois, sitting by designation.

APPENDIX F

In the United States District Court
Southern District of Illinois
Northern Division

William Kurek, et al., Plaintiffs, v. Pleasure Driveway and Park District of Peoria, Illinois, et al., Defendants.	No. P-Civ-76-9.

DECISION AND ORDER

(Filed June 1, 1976)

This action is the latest step in a rather long history of litigation concerning the termination by defendant Park District of plaintiffs as golf course greenskeepers and as concessionaires in certain golf "pro shops." Plaintiffs are the former combination greenskeepers and golf professionals of the five municipal golf courses at Peoria, Illinois. The defendant Pleasure Driveway and Park District owns and operates the golf courses. Defendants Luthy, Canterbury, Cummings, Noble, West, and Vonachen all are or were elected members of the Board of Trustees of the Park District. Defendants Owens, Fuller, Ohlemiller, and Borror are officers of the Park District, and defendant Frederick is its attorney. Golf Shop Management, Inc. is the present single concessionaire at the golf courses, and Ramsey is a principal officer of Golf Shop Management. The defendants have moved to dismiss on several grounds. Plaintiffs have filed verified motions in opposition to the motion to dismiss and for partial summary judgment, and, subsequent to hearing thereon, have filed supplemental affidavits.

History of Litigation

A summary of the prior litigation between the parties is necessary to fully understand the current status of the controversy. After discussions concerning proposed changes in their arrangements with plaintiffs, the Park District, on January 17, 1974, accepted a bid from Golf Shop Management to operate the concessions on all five municipal golf courses. In prior years, plaintiffs had operated the concessions pursuant to uniform written agreements which, by their terms, expired December 31, 1973. By letters to plaintiffs from the Park District, dated October 1, 1973, the concessions were terminated, effective December 31, 1973; but such letters specifically said that termination as greenskeepers was not intended.

Plaintiffs filed suit in this court (P-CIV-74-11) on January 22, 1974, alleging violations of antitrust and civil rights laws. On February 15, 1974, this court allowed defendants' motion to dismiss that case. Plaintiffs refused to surrender possession of the pro shops, and the Park District then filed a forcible entry and detainer action against the plaintiffs in an Illinois court on February 20, 1974. Plaintiffs were also discharged from their employment as greenskeepers at that time "because of your uncooperative attitude and total unresponsiveness to Park Staff and Board direction."[1]

Plaintiffs filed a counterclaim in the forcible entry and detainer action and ultimately received a jury verdict and judgment in their favor. In the meantime, plaintiffs were appealing the dismissal in this court. The United States Court of Appeals for the Seventh Circuit agreed with the decision of this court with respect to matters actually decided, but remanded for a hearing on a motion to open, alter, or amend the judgment, noting that plaintiffs might have obtained some rights by the intervening

[1] Letters dated February 20, 1974, were served upon the plaintiffs by the Park District.

judgment on jury verdict in the state court. That state court judgment, however, was reversed by the Third District Illinois Appellate Court on March 27, 1975, and that decision became final.

Golf Shop Management then entered into possession of the pro shops. On August 8, 1975, plaintiffs filed their own forcible entry complaint against Golf Shop Management. The complaint was dismissed and plaintiffs were enjoined from further litigation involving the possession of the pro shops, excepting money damages, and they were ordered to pay attorney fees to the Park Distirct. Other motions by plaintiffs for relief to the Illinois Appellate Court and Illinois Supreme Court were also denied.

On June 25, 1975, the Park District filed an action for damages in the state court against plaintiffs for holding over possession of the pro shops after termination of their "leases." Plaintiffs here (defendants in that action) filed a counterclaim alleging that the Park District unlawfully terminated their employment as a greenskeepers. The Park District obtained a joint judgment for $127,605 in that action, and the "pro's" appeal therefrom is still pending.

On August 15, 1975, plaintiffs filed another suit in this court P-CIV-75-60, alleging that their rights to petition, to due process, and to equal protection of the law were violated by the state court proceedings. A motion to dismiss was allowed on the ground that the complaint sought to relitigate issues which had been finally determined in the courts of Illinois. Plaintiffs now bring the instant action alleging antitrust and civil rights violations somewhat more specifically.

Allegations of the Complaint

Plaintiffs' allegations, of course, must be taken as true for purposes of the motion to dismiss.

In summary, it is alleged that plaintiffs were employed as greenskeepers and, in addition, had "leases" to operate the golf course concessions, which included the right to sell "Pro Line" golf equipment. Negotiations were begun concerning the renewal of the leases for 1974; and the Park Board insisted upon an increase in concession rental revenues. Golf Shop Management submitted its bid (amounting to $90,000 more per year) on December 17, 1973, for all five courses. It is alleged that the existence of that bid was then coupled by defendants with a threat of final termination of plaintiffs' concession arrangements. On January 16, 1974, the Park Board informed plaintiffs that they had only until January 19, 1974 to accept a new concession contract requiring a rental equal to 5 percent of their gross receipts. Plaintiffs refused, stating that 5 percent of their gross receipts was prohibitive, and claiming that antitrust laws prevented them from entering into a contract having the effect of raising, fixing, and maintaining their retail, rental, and service prices.

It is further alleged that on January 23, 1974, the Park Board executed a concession agreement with Golf Shop Management, and that it agreed to indemnify Golf Shop Management for any loss due to obstructive litigation involving these plaintiffs. Plaintiffs assert that more than $215,000 of local governmental funds, credit, and property have been used to subsidize Golf Shop Management. They state that defendants Frederick, Owens, Fuller, Borror, Ohlemiller, Golf Shop Management, and Ramsey were the arch-conspirators of a plot to award Golf Shop Management the right to operate the pro shops. The alleged aim of the Park District employees was to induce tax levies contrary to the Illinois constitution in aid of their own salaries, and in the case of the attorney, to conceal violations of Illinois local governmental appropriation laws. The aim of Golf Shop Management is said to have been to monopolize the Park District concession rights. The Park Board members are alleged to have been unwitting tools of the conspiracy through January 19, 1974, and thereafter it is asserted that they also conspired to conceal violations of local governmental appropriations laws. It was because of all this, it is alleged, that plaintiffs refused to release possession of the pro shops, the original forcible entry suit was brought, and plaintiffs were discharged from their employment as greenskeepers.

Declaratory and injunctive relief is sought against all of the defendants, and treble damages totaling almost 8 million dollars is claimed against all of the defendants except the Park District for antitrust violations in Count I. Count II seeks $2,627,605 in damages against all the defendants, except Golf Shop Management and Ramsey, for violation of plaintiffs' civil rights.

What plaintiffs apparently seek to allege in Count I is a scheme to fix local golf equipment prices by demanding excessive rent from the plaintiffs and, alternatively, a plot to obtain the exclusive and therefore monopolistic concession rights on Park District golf courses for the benefit of Golf Shop Management. Also alleged in Count II is violation of plaintiffs' federally protected civil rights by defendants acting under color of local governmental authority. More particularly, under the circumstances alleged, the termination of the concession rights is claimed to violate the Just Compensation and Due Process Clauses of the Fifth and Fourteenth Amendments, and termination of employment as greenskeepers is alleged to violate the Petition Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

COUNT I

While there are some insignificant additions, basically the same operative facts are alleged in this complaint as were alleged in case number P-CIV-74-11 filed January 22, 1974. The court dismissed that complaint for failure to state a claim upon which

relief could be granted. The Seventh Circuit Court of Appeals remanded, to enable this court to pass upon a motion to open, alter, or amend; but the Appeals Court agreed that *Parker v. Brown*, 317 U.S. 341 (1943), would exempt defendants from any apparent cause of action for antitrust violation.[2] To the extent that the same issues are raised in this complaint, plaintiffs are barred by principles of res judicata. However, since the date of the earlier unpublished order of the Court of Appeals, the Supreme Court of the United States and the Court of Appeals for the Seventh Circuit have both issued opinions further explaining the governmental exemption of *Parker*. This complaint will be considered in the light of those principles.

The Supreme Court created the governmental action exemption from the Sherman Act in *Parker v. Brown, supra*. Restraint of trade that is otherwise violative of the Sherman Act does not create a cause of action if the anticompetitive activity is the result of valid governmental action. The question of possible agency involvement in any conspiracy to restrain trade was reserved. 317 U.S. at 351, 352. The California farm products marketing program in *Parker* was held to be exempt from Sherman Act proscription because the state legislature commanded the implementation of the program. 317 U.S. at 350. *Parker* was expanded in *Eastern Railroad Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), to exempt concerted effort to induce or to influence public officials to pass or enforce laws. *Noerr* involved an attempt by several railroads to persuade and induce legislative and executive action against long haul truckers. The holding was based on the *Parker* exemption and the First Amendment right to petition the government. The Court limited its holding to genuine efforts to influence governmental action, and specifically refused to immunize "attempts to interfere directly with the business relationships of a competitor," where the efforts to persuade govern-

[2] Plaintiffs were later permitted to dismiss that case without prejudice.

ment appeared to be a mere "sham." 365 U.S. at 144. The *Noerr* rule was further developed by *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), where the Court immunized efforts to influence public officials even though the efforts were part of a broader scheme violative of the Sherman Act. *Parker* and *Noerr-Pennington* doctrine form the framework of the governmental action exemption.

The Supreme Court applied the developed *Parker* principle to a minimum fee schedule established by a local bar association in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). The initial inquiry was stated to be whether the activity alleged to be anticompetitive is required by the state acting as sovereign. 421 U.S. at 790. The Virginia Supreme Court Rules stated that county bar fee schedules were to provide some guidance in setting fees, but did not require strict adherence. Because the State of Virginia did not require the anticompetitive activity of following minimum fee schedules, the governmental action exemption was held not available to the defendants.

The Court of Appeals for the Seventh Circuit applied the *Parker* and *Noerr-Pennington* doctrines to facts quite similar to the case at bar in *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (1975). There, an unsuccessful applicant for a city cable television franchise brought a Sherman action against the successful applicant, its owner, the owner's officers, the mayor of the city, and one alderman. The successful applicant was alleged to have persuaded the city council to award the cable franchise to it and to deny a hearing to the plaintiff on plaintiff's application. The actions of the city council in granting a franchise to CATV and not to Metro were held not violative of the Sherman Act under *Parker*, even though CATV was given a monopoly thereby and Metro was prevented from competing. The concerted efforts of the applicant and its agents to induce governmental action were held immune under *Noerr*, even though there might have been an anticompetitive purpose and effort as alleged by Metro. 516 F.2d at 228. The

"sham" exception referred to in *Noerr* was inapplicable because the injury to Metro was caused by governmental action which CATV genuinely and successfully attempted to induce the city council to take. The mayor and alderman were also held immune, despite allegations that they accepted campaign contributions in return for their support. *Noerr* was held to provide antitrust immunity to governmental actions even when officials act in their own self interest. 516 F.2d at 230.

The Park District is alleged as a conspirator here to the extent that the Board of Trustees was persuaded to award the concession contract to Golf Shop Management and to the exclusion of the plaintiffs. The Park District is empowered by law ". . . to construct, equip and maintain . . . golf . . . courses . . . ." Ill. Rev.Stat. ch. 105, §8-10. The award of a concession contract as an adjunct to operation of the golf courses is clearly exempted by *Parker* and its progeny. This is not a case where the public entity is alleged to have become a participant in a private agreement or combination by others for restraint of trade. *See Parker, supra* at 351, 352. Nor is it a case like *Whitten v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1975), where a competitive bidding statute evidenced the state policy in favor of competition. The Park District is not required to obtain competitive bids for services of individuals, such as golf pros, possessing a high degree of professional skills. Ill. Rev. Stat. ch. 105, § 8-1(c). The Park District, nevertheless, did request bids before awarding the Golf Shop Management contract to the highest bidder. It did not discriminate against certain applicants, as it was alleged the defendants did in *Duke & Company, Inc. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975). In fact, plaintiffs declined an offer of rent as a percentage of sales which it might be argued tended to discriminate in their favor.

The Park Board and Park District officers and attorney are alleged to have conspired to award the concession rights to Golf Shop Management and to raise concession rents. Their alleged

aim was to induce illegal tax levies and to conceal violations of local governmental appropriation laws for their own benefit, or for the personal benefit of some of them. Whatever laws such a breach of fiduciary duty might violate, if true, the federal antitrust laws are not among them. *Metro Cable, supra.*

Golf Shop Management, through Ramsey as its executive officer, was the successful bidder on the concession contract. Their conduct in inducing the award of the contract is within the protection of the *Noerr-Pennington* rule as well. Their actions were alleged to have been aimed at acquiring the concession contract for their own business advantage. There is no allegation of injury caused other than by governmental action, which Golf Shop Management and Ramsey successfully attempted to induce the Park District to take. There is no basis for suggestion of any possible applicability of the "sham" exception to the *Noerr-Pennington* doctrine.

COUNT II

Jurisdiction of the civil rights claim is alleged under 28 U.S.C. § 1331(a) as to the Park District, and under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 as to the individual trustees and officers. While the court does have subject matter jurisdiction of the claim against each defendant, there is substantial question as to the existence of any cause of action against the Park District. The Park District is not a person within 42 U.S.C. § 1983; therefore, the First and Fifth Amendments must directly supply a protected right for an action for damages to exist. The Fourth Amendment has been held to create an action for damages for wrongful police action, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); but the Supreme Court has not yet considered whether either the First or Fifth Amendment creates that type of action. A few lower federal courts are divided on the issue.[3]

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[3] *See Greenya v. George Washington*, 512 F.2d 556, 562, n. 13 (D.C. Cir. 1975), for cases recognizing the cause of action and for cases contra.

The court need not decide whether a cause of action exists against the Park District, however, because the court considers any civil rights claim based on these operative facts barred by previous state court decisions. As to plaintiffs' contention that the termination of the concession rights violated their Fifth Amendment rights, the Illinois Appellate Court held that, as a matter of law, plaintiffs' rights to possession of the pro shops under the concession agreements terminated on December 31, 1973. *Pleasure Driveway and Park District v. Kurek*, 27 Ill. App.3d 60 (3d Dist. 1975). As to plaintiffs' contention that termination of their employment as greenskeepers, because they undertook to litigate their claim of rightful possession of the pro shops, violated the Petition Clause of the First Amendment. Judge Iben of the Tenth Judicial Circuit of Illinois found that the reason for their discharge was not the exercise of the right to litigate issues, but, rather, their insistence on holding over in possession of the pro shops after the termination of their "leases," to the detriment of the Park District. The right to litigate does not carry with it a right to lose with impunity.

When the issues in the state proceedings are substantially identical and are decided on the merits, subsequent civil rights claims are barred. *Phillips v. Shannon*, 445 F.2d 460 (7th Cir. 1971). The issues which plaintiffs seek to litigate here were previously adjudicated on the merits, and defendants' motion to dismiss must be allowed as to Count II.

Accordingly, IT IS ORDERED that plaintiffs' motion in opposition to the motion to dismiss and for partial summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants' motion to dismiss is ALLOWED and the case is DISMISSED with prejudice.

/s/ ROBERT D. MORGAN
United States District Judge

Entered: June 1, 1976

APPENDIX G

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued January 16, 1975

January 23, 1975

Before

Hon. Tom C. Clark, Associate Justice (Retired)*

Hon. John S. Hastings, Senior Judge

Hon. John Paul Stevens, Circuit Judge

"Unpublished Order" Not to be cited, per Circuit Rule 28

(Filed January 27, 1975)

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones and Richard Hoadley,

Plaintiffs-Appellants,

No. 74-1342 vs.

Pleasure Driveway and Park District of Peoria, Illinois, an Illinois Political Subdivision; George L. Luthy, President, and John R. Canterbury, James A. Cummings, Irene Branson, Bonnie W. Noble, Clyde West, Harold A. (Pete) Vonachen, Jr., Individually and as President and Members of the Board of Trustees of the Pleasure Driveway and Park District of Peoria: Rhodell E. Owens, Individually and as Director of Parks and Recreation; Jack M. Fuller, Individually and as Administrative Assistant; Daniel B. Ohlemiller, Individually and as Business Administrator; Frank D. Borror, Individually and as Superintendent of Maintenance; William McD. Frederick, Individually and as Attorney of Pleasure Driveway and Park District of Peoria; Golf Shop Management, Inc., an Illinois Corporation; Gordon A. Ramsey and Richard H. Parsons,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.

No. P Civ 74 11
Robert D. Morgan,
Judge.

Order

Plaintiffs, five pro-greenskeepers at the public golf courses operated by defendant Pleasure Driveway and Park District of Peoria, Illinois, appeal from the district court's dismissal with prejudice of their Complaint, alleging a deprivation of property without due process of law or just compensation and a violation of the federal antitrust laws, for failure to state a claim upon which relief can be granted within the subject matter jurisdiction of the federal courts. For the following reasons, we vacate the judgment entered below and remand.

We agree with the district court's determination that plaintiffs, in their original Complaint, failed to allege facts sufficient to demonstrate that their continued operation of the golf course pro shop concessions amounted to a property interest protected by the Fourteenth Amendment rather than a mere "unilateral expectation." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577. Similarly, under *Parker v. Brown*, 317 U.S. 341 and its progeny, we cannot read Count II of the Complaint as stating a cause of action under the federal antitrust laws.

In their Motion to Open, Alter or Amend Judgment, filed on February 25, 1974, in the district court, and apparently not ruled on by the district judge, plaintiffs alleged:

> 10. * * *
>
> (a) That the plaintiffs have been employees and independent contractors of the Park District for more than 85 years and on or about October 1, 1973, *each had proprietary contracts providing explicitly and implicitly for leases through and beyond December 31, 1974.* (Emphasis added.)

Attorney for plaintiffs made a similar representation orally to the district court during consideration of his motion for a temporary restraining order. *See* Transcript of Proceedings on January 22, 1974, at 10 (R. 100).

Furthermore, the parties have informed us at oral argument that the plaintiffs have prevailed in a forcible entry and detainer action brought against them by the Park District in Illinois state court; they apparently convinced the circuit court jury that they were entitled to continued occupancy of the golf pro shops. The Park District has appealed from that judgment.

We do not know what action the district judge would have taken on the Motion to Open, Alter or Amend Judgment if he had had an opportunity to rule on that motion before notice of appeal was filed. Although the motion was filed within 10 days after entry of the judgment, we do not know whether or not service was timely within the meaning of Fed. R. Civ. P. 59(e), nor, obviously, are we in any position to express any opinion on the sufficiency of any amended pleading which plaintiffs might tender to the court. However, in view of the fact that the record before us does indicate that plaintiffs might be able to make allegations describing an interest in property, and in view of the further fact that the district court's order was apparently predicated in part on their failure to do so in the original complaint, it seems appropriate to vacate the district court's order and remand the case for the purpose of giving the district judge an opportunity to rule on the foregoing Motion to Open, Alter or Amend Judgment. We, of course, indicate no views on the possible sufficiency of any amended pleading, or the appropriate disposition of the foregoing motion.

Accordingly, the judgment of dismissal with prejudice is vacated and the case is remanded for further proceedings.

APPENDIX H

In the United States District Court
Southern District of Illinois
Northern Division

William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones, and Richard Hoadley,

Plaintiffs,

v.

Pleasure Driveway and Park District of Peoria, Illinois, an Illinois Political Subdivision; George L. Luthy, President, and John R. Canterbury, James A. Cummings, Irene Branson, Bonnie W. Noble, Clyde West, Harold A. (Pete) Vonachen, Jr., Individually and as President and Members of the Board of Trustees of the Pleasure Driveway and Park District of Peoria; Rhodell E. Owens, Individually and as Director of Parks and Recreation; Jack M. Fuller, Individually and as Administrative Assistant; Daniel B. Ohlemiller, Individually and as Business Administrator; Frank D. Borror, Individually and as Superintendent of Maintenance; William McD. Frederick, Individually and as Attorney of Pleasure Driveway and Park District of Peoria [Golf Shop Management, Inc., an Illinois Corporation; Gordon A. Ramsey, Richard H. Parsons and Norman Hapertepel],

Defendants.

No. P-CIV-74-11.

DECISION AND ORDER

(Filed February 13, 1974)

The Complaint herein undertakes to state several federal and state causes of action on behalf of five former golf shop concessionaires who had contracts with defendant park district, a special public municipal corporation existing under Illinois law to levy taxes and to own, maintain and operate public parks and recreation facilities within a fixed area in Central Illinois. The other defendants are the elected members and officers of the board of the park district, its Director of Parks and other staff members, its legal counsel, and a corporate replacement concessionaire, along with the principals of that corporation. Defendant Parsons files an affidavit that he has acted as attorney and registered agent only of said corporation. The supposed federal causes of action are stated to be violations of plaintiffs' civil rights under color of state law (42 U.S.C. § 1983) and violation of the federal antitrust laws (15 U.S.C. §§ 1 and 2). Presumably, under supposed pendent jurisdiction, this court is also asked to find violation of antitrust laws of the State of Illinois and to adjudicate or reform former contracts so as to find them remaining in effect.

The park district and its people have filed one motion and the new concessionaire and its people have filed another, both under Rule 12(b)(1) and (6), F.R.Civ.P., on the ground that the Complaint shows on its face that there is no federal jurisdiction over the subject matter and that the Complaint states no claim upon which relief can be granted.

Upon careful consideration of said motions and the Complaint, this court is fully satisfied that these motions must be allowed and that the Complaint must be dismissed.

While, normally, amendment would be allowed as a matter of course on dismissal of a complaint, this court can conceive

no basis whatsoever for federal jurisdiction over the general subject matter set forth in this complaint between the parties here involved; hence, no case here to which possible state causes of action could append, and consequently no justification for further proceedings here. Accordingly, this dismissal is final and with prejudice, in order that any desired proceedings elsewhere need not be delayed or further encumbered here.

Accordingly, It Is Ordered that the motions to dismiss on behalf of all defendants are Allowed and the action is Dismissed with prejudice.

/s/ Robert D. Morgan
United States District Judge

Entered: Feb. 15, 1974

APPENDIX I

In the United States District Court for the
Southern District of Illinois
Northern Division

William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones, and Richard Hoadley,
Plaintiffs,
vs.
Pleasure Driveway and Park District of Peoria, Illinois, a Special Unit of Illinois Local Government, et al.,
Defendants.
No. P-CIV. 75-0060

ORDER

(Filed September 19, 1975)

This matter coming on to be heard upon the Defendants' Motions to Dismiss, and the Plaintiffs and the Defendants being present by their attorneys of record, and the Court having heard the arguments of counsel, and being fully advised;

The Court Finds, that it has no original jurisdiction to review the decision rendered in the state courts, and that the Plaintiffs' procedure, if any, was to appeal to the U. S. Supreme Court from the state court's decisions and orders.

It Is Therefore Ordered, that the Defendants' Motions to Dismiss be and the same are hereby allowed, and the Plaintiffs' complaint be and the same is hereby dismissed, with prejudice.

Dated: Sept. 19, 1975, *nunc pro tunc* Sept. 15, 1975.

Robt. Morgan
Judge

In the United States District Court
Southern District of Illinois
Northern Division

William Kurek, et al.,
Plaintiffs,
v.
Pleasure Driveway and Park District of Peoria, Illinois, et al.,
Defendants.
No. P-CIV-74-11
and
No. P-CIV-75-60

ORDER ON MOTIONS

(Filed Sept. 30, 1975)

Both cases bearing the above numbers are between essentially the same persons, although there has apparently been some succession in office among defendant members of the "Park Board." Case Number P-CIV-74-11 was dismissed without prejudice on plaintiffs' own motion on May 2, 1975. Their motion for "relief" from that order, under Rule 60(b), F.R.Civ.P., is so ridiculous as to raise grave doubts of the bona fides of their position, and their contentions of "fraud" in legal argumentation strongly suggest wanton harassment. That case has been closed at plaintiffs' request for almost six months, and will remain so.

Plaintiffs' Complaint filed in Case Number P-CIV-75-60 on August 15, 1975, sought an injunction to restrain further proceedings in Illinois courts, judgment declaring an Illinois statute unconstitutional, as applied by the Illinois courts in a suit against plaintiffs, judgments declaring defendants "liable to plaintiffs," and such other relief as may be just. It was dismissed on motions of the defendants on September 15, 1975 (written order filed

September 19, 1975), on the ground that it sought to relitigate here contentions on federal rights which had been submitted to, and decided by, the courts of Illinois. This court held that the route for such federal review was to the United States Supreme Court from the Illinois Supreme Court, and not by an action in federal district court. The present motions asks, under Rule 59, F.R.Civ.P., that the dismissal order be "altered or amended" to grant plaintiffs leave to file, on or before October 6, 1975, an amendment to the Complaint, to include new Counts II and III, which are not tendered with the motion, but which are generally indicated, by references to the statutes, to involve supposed violation of federal civil rights of plaintiffs by defendants under color of state law and relief from conspiracy in restraint of trade and monopoly.

It is stated, in support of the latter instant motion, that plaintiffs do not intend to appeal the dismissal decision herein "unless it be necessary to effectuate their right to amend." While there are some five pages of assertions and argumentative material included in said motion, no ground is apparent for making any such supposed causes of action further counts in this suit which has been closed, rather than a separate action which could stand or fall on its own allegations. This court would not desire to delay or discourage appeal, if it is believed that any prior decision is erroneous.

It appears to this court that any federal cause of action which now is believed by plaintiffs to exist, apart from an effort to have this court review or alter the effect of the basic state court judgment, should be alleged in a new complaint in a new action, so that the allegations thereof under Rule 8 may be tested as to sufficiency as matters of law, uncluttered with items of supposed proof; and if found sufficient, the defendants will be able to admit or deny to raise any issues for trial, as contemplated by the Federal Rules of Civil Procedure. Plaintiffs should bear carefully in mind, however, that this suggestion is in no sense

an invitation to relitigate any issue previously decided between the parties, here or in the courts of Illinois, and that any effort to do so will call for the imposition of sanctions for vexatious pleading.

Accordingly, IT IS ORDERED that the plaintiffs' Motion for Relief Under Rule 60(b), in Case Number P-CIV-74-11, and the Motion to Alter or Amend, in Case Number P-CIV-75-60, are DENIED.

Robert D. Morgan
United States District Judge

APPENDIX J

State of Illinois
(Seal)
Appellate Court Third District
Ottawa

74-127

Pleasure Driveway and Park District of Peoria, Peoria, Illinois, an Illinois Political Sub-division

vs.

William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones, and Richard Hoadley

At a term of the Appellate Court, begun and held at Ottawa, on the 1st day of January in the Year of our Lord one thousand nine hundred and seventy-five within and for the Third District of Illinois:

Present—

Hon. Allen L. Stouder, Presiding Justice

Hon. Albert Scott, Justice

*Hon. Richard Stengel, Justice

John E. Hall, Clerk

James A. Callahan, Sheriff

Be It Remembered, that afterwards on March 27, 1975 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

No. 74-127

Pleasure Driveway and Park District of Peoria, Peoria, Illinois, an Illinois Political Subdivision,
Plaintiff-Appellant,
vs.
William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones and Richard Hoadley,
Defendants-Appellees.

Appeal from the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County.

Honorable Robert A. Coney, Judge Presiding

Mr. Justice Stengel delivered the opinion of the Court: Publish in Full.

The Peoria Park District (plaintiff) brought a forcible entry and detainer action against five golf professionals (defendants) for possession of the golf concession shops at the five public golf courses owned by plaintiff. Defendants filed an amended answer, affirmative defense and counterclaim. Following a three week jury trial, a verdict and judgment were entered on April 23, 1974, in favor of defendants. Plaintiff's post trial motion was denied, and on May 6, 1974, a judgment order was entered which gave defendants possession of the premises and granted additional injunctive relief to defendants to enforce their employment and concession contracts. Plaintiff appeals from the judgment orders entered on April 23 and May 6, and from the order denying their post trial motion.

The dispute which gave rise to this litigation originated in negotiations for concession agreements for the year 1973 between the Peoria Park District and the golf pros who operate the pro shops and who were employed as greenskeepers at the

five golf courses owned by the Park District. It is not disputed that since 1959 the concession agreements had provided for a one year term ending December 31st of each year with a fixed fee or rent paid to the park district.[1]

During 1972 the Park Board proposed that the rental fee for 1973 be changed to 1½% of gross receipts. After prolonged discussions failed to produce an agreement, the golf pros retained an attorney in July of 1973 and authorized him to negotiate contracts in their behalf.

During further negotiations the Park Board refused to accept a rental fee of 5% of net income, but finally, on Sept. 12, 1973, offered to accept 1½% of gross receipts for 1973 and 1974 on the condition that the contracts were signed and returned by Sept. 20. Later the deadline was extended to 4:30 p.m. October 2. The golf pros signed contracts on Oct. 1, 1973, with four of the contracts providing for a term from Jan. 1, 1973, to Dec. 31, 1974, and gave the contracts to their attorney who did not deliver them.[2] On Oct. 3, notices of termination of the concession contracts effective Dec. 31, 1973, were given to four of the golf pros. At an Oct. 10 meeting the Park Board voted to refuse the two year contracts and to accept one year contracts at 1½% of gross receipts, provided the signed contracts were delivered the next day. On Oct. 11 the attorney for the golf pros approved the change in the termination date to Dec. 31, 1973, in the four contracts in his possession and delivered them to the Park Board. The agreements were signed on behalf of the Park Board the same day.

In November of 1973 negotiations commenced between the Park Board and the golf pros for the 1974 contracts, and the

[1] For 1972, the annual rental fee paid by four of the defendants was $600 each and by one defendant, $300.

[2] One defendant, Kurek, personally returned his contract to the Park Board on Oct. 2. This contract was originally drawn with a Dec. 31, 1973, expiration date.

Park Board also prepared bid specifications for concession rights for 1974. Having failed to reach agreement with the defendants, the Park Board on Jan. 19, 1974, awarded a three year contract for concession rights to Golf Shop Management, Inc. (GSM), with the stated intention of continuing defendants' employment as greenskeepers.

On Jan. 21, 1974, each of the five golf pros were served with a 30-day notice to terminate tenancy of the premises occupied by the concession shops, and on Feb. 20, 1974, the Park District filed its complaint in this cause to recover possession of the five golf pro shops at its golf courses.[3] On the same date the Park Board terminated the employment of the golf pros as greenskeepers.

The record of the proceedings in the circuit court is replete with motions, orders and pleadings, and no useful purpose would be served by attempting to summarize all of the various pre-trial procedures and rulings in this case. Included among the ruling of the circuit court were a denial of plaintiff's motion for summary judgment, dismissal of defendants' third party complaint against GSM, severance of defendants' original counterclaim for purposes of trial, and denial of plaintiff's motion to dismiss defendants' amended affirmative defenses and counterclaim.[4]

The complaint sought to recover possession of the pro shops on the ground that the leases expired Dec. 31, 1973. The

[3] On Jan. 22, 1974, the five golf pros filed suit in the U.S. District Court for the Southern District of Illinois, Northern Division, seeking declaratory and injunctive relief for alleged deprivation of property without due process of law or just compensation, and for an alleged violation of federal antitrust laws. The complaint was dismissed with prejudice, and, on appeal, the dismissal was affirmed but the case was remanded for consideration of the golf pros Motion to Open, Alter or Amend Judgment, which motion is still pending.

[4] Affirmative defenses filed by defendants were withdrawn at the close of all the evidence.

defendants in their answer denied the expiration date and also denied that the concession agreements were the sole basis of possession, and, in their counterclaim asserted that their employments as greenskeepers was so inter-related with the concession agreements as to form one contract; that the discharge of defendants from their employment on Feb. 20, 1974, amounted to forcible entry upon defendants' possessory rights; and that erecting tents on the five golf courses trespassed on defendants' possessory rights (apparently the plaintiff erected tents for use by GSM for selling admission and renting golf carts during 1974). Defendants' counterclaim also alleged that certain other acts of plaintiff, such as issuing press releases, constituted forcible entry, but such assertions were so obviously frivolous that we will not consider them here.

The cause proceeded to trial before a jury which returned a verdict for defendants on both the complaint and counterclaim and also returned the following answers to special interrogatories:

> "Do you find that the Plaintiff entered upon defendants' premises with force and thereby interfered with their rights of possession?
>
> Answer . . . Yes.
>
> "Do you find that the Plaintiff and Defendants entered into an agreement which expired or terminated December 31, 1973?
>
> Answer . . . No."

Plaintiff's post trial motion was denied, and on May 6, 1974, the court entered an order which granted defendants possession of the golf pro shops, enjoined plaintiff from interfering with operation of the golf courses, restored defendants to their employment as greenskeepers, granted defendants exclusive operation of the pro shops and golf courses, enjoined plaintiff from spending any funds for pro shop or golf course concessions

other than for or on behalf of defendants, and ordered plaintiff to pay defendants' wages and other benefits from and after Feb. 20, 1974, in the amounts appropriated for 1974.

On appeal plaintiff's chief contentions are (1) that the trial court erred in denying its motion for summary judgment and its motion for directed verdict and for judgment n.o.v.; (2) that the trial court did not have jurisdiction to grant injunctive and mandatory relief in its May 6 order; (3) that plaintiff was deprived of a fair trial because of improper conduct of defense counsel and the court's erroneous rulings on evidence and instructions.

Although the parties have asserted numerous issues in this appeal, we believe the determinative question is whether defendants' employment as greenskeepers was such an integral part of the concession agreements that it could be introduced to show a defense germane to the question of right of possession.

For many years equitable defenses to forcible entry and detainer actions were not permitted. After the fusion of practice and procedure in cases at law and in equity accomplished by the Civil Practice Act, equitable defenses were permitted but an amendment to Section 5 of the Forcible Entry and Detainer Act (Ill. Rev. Stat. c.57, Sec. 5) limited such defenses, as follows:

> "No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise. . . ."

In a 1970 decision, the Supreme Court of Illinois broadened the concept of "germane matters" to permit the validity and enforcibility of installment contracts for the purchase of realty to be raised as a defense in a forcible entry and detainer action. In *Rosewood Corp. v. Fisher*, 46 Ill. 2d 249, 263 N.E.2d 833, 837 (1970), the court quoted with approval from *Bleck v.*

Cosgrove, 32 Ill. App. 2d 267, 177 N.E.2d 647, 649 (2d Dist., 1961), where the purpose of forcible entry and detainer was stated to be "a summary statutory proceeding to adjudicate rights to possession . . . unhampered and unimpeded by questions of title and other collateral matters not directly connected with the question of possession."

In *Rosewood*, it was alleged by defendants, that the payment and forfeiture provision of the purchase contracts upon which they had defaulted were invalid and unenforcible and in violation of the constitutionally guaranteed civil rights of defendants. The trial court refused to permit these defenses, and on direct appeal, the supreme court reversed.

The problem of giving effect to the statutory requirement that defenses be germane to the question of possession while permitting defenses within the principles announced in the *Rosewood* decision has been troublesome. In its most recent decision, the supreme court noted:

> "Only matters germane to the distinctive purpose of forcible entry and detainer proceedings may be introduced . . . That purpose is to adjudicate rights of possession, and only matters germane to those rights are properly pleaded or considered. In the recent cases of *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972), and *Peoria Housing Auth. v. Sanders*, 54 Ill. 2d 478, 298 N.E.2d 173 (1973), landlords sought possession in forcible entry and detainer actions because tenants had failed to pay rent. We there held that the questions whether the defendants in fact owed rent in view of alleged breaches of an express covenant to repair, a breach of implied warranty, and an unconstitutional rental policy, were germane." *Clore v. Fredman*, 59 Ill. 2d 20, 319 N.E.2d 18, 21 (1974).

In *Clore*, the court then held that defendants' answer, which alleged that suit was brought in retaliation for complaints by

the tenant to governmental authorities was germane to the action and stated a defense, particularly since specific statutory ordinance provisions forbidding retaliatory eviction were allegedly violated.

In another recent decision, the court noted that the cases broadening the scope of available defenses have arisen where questions of rent are involved, or where, as in *Rosewood*, the invalidity of the purchase contract upon which the action was based was offered as a defense. *Germania Fed. S. & L. Ass'n v. Jacoby*, 23 Ill. App. 3d 145, 318 N.E.2d 734 (5th Dist., 1974). The court then affirmed the ruling of the trial court that, where rent was not an issue, defendant could not raise objections about the condition of the premises for the first time after the forcible entry and detainer action was commenced.

In *Bleck v. Cosgrove, supra*, a question similar to the one before us was raised. In a forcible entry and detainer action, the trial court had entered judgment on the pleadings for possession and rent in favor of the plaintiff, who was the court-appointed receiver of a country club, and against defendant as a tenant of that club. Defendant was a shareholder of the club, and attempted to defend the forcible entry and detainer action on numerous grounds, including the invalidity of the previous foreclosure proceedings to which he was not a party. On appeal, the court ruled that the interests of defendant as shareholder and as tenant embrace separate legal concepts and that in a forcible entry and detainer proceeding he is limited to an assertion of his rights as tenant.

In the case before us, the defenses asserted by defendants go beyond any of the matters previously held to be germane. The pleadings of the defendants consisted of their amended answer and counterclaim. Although the answer denied the 1973 expiration date of the concession agreements, the defendants, in their testimony at trial, admitted that they signed

the agreements and that they authorized the change of termination date to Dec. 31, 1973. Thus there was no factual dispute as to the existence and provisions of the written contracts. The only controversy remaining to be resolved from the complaint and amended answer was a qeustion of law: Did the expiration of the contracts on Dec. 31, 1973, terminate defendants' right to possession of the pro shop premises as lessees? Where the terms of a contract have been specifically determined, then the legal effect of such contract presents a pure question of law, and the court alone is permitted to construe it. *St. Louis Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514 (1882).

We are persuaded that, as a matter of law, the defendants' rights to possession of the pro shops under the concession contracts ended on Dec. 31, 1973. Plaintiff admits that the golf pros had a dual relationship with the Park Board in that they were also employed as greenskeepers, but contends that the employer-employee relationship was not a part of the concession agreements. The concession contracts made no reference to this employment, and defendants have made no claim that the parties at any time expressly agreed that their employment and concessions were mutually dependent. It is admitted that the employment continued until Feb. 20, 1974, when terminated by action of the Park Board. Therefore, we hold that defendants' employment as greenskeepers was not germane to the question of their right to possession of the pro shops, but instead was a separate contractual relationship.

Defendants also filed an amended counterclaim (which was in the form of an answer) alleging that plaintiff was barred from asserting any right to possession by its forcible entry in violation of defendants' rights thereof, and that the unlawful entry was accomplished by termination of defendants' employment as greenskeepers and the erection of tents on the golf courses for use by GSM, the successor concessionnaires. None

of the acts complained of involved a physical entry on the pro shop premises but at most diminished defendants' income which defendants claim amounted to a constructive entry. Having determined that the possessory rights of defendants ended on Dec. 31, 1973, it is obvious that the events complained of in the counterclaim, all of which occurred in 1974, are not germane to this action.

Defendants have contended before this court: "If the totality of defendants' judicially decided rights can be arbitrarily denied under the guise of irrelevant and immaterial remedial labels and false lease claims, then the Forcible Entry and Detainer Act and these judicial proceedings are repugnant to the 1st and 14th Amendments to the federal constitution and sections 2, 5, 12, and 13 of Article I of the Constitution of Illinois." As we understand it, defendants are saying that a ruling against defendants by this court would demonstrate the unconstitutionality of the Forcible Entry and Detainer Act. The statute in question has previously been held to provide procedural due process by allowing certain germane equitable defenses to be considered. *Johnson v. Illinois Dept. of Public Aid*, 467 F.2d 1269 (7th Cir., 1972). Defendants here have had ample opportunity to plead any germane defense that might be available to them, and have offered none. The fact that they were unable to agree to terms for a renewal of their concession contracts with the Park District obviously results in an economic hardship to them, but one that is part of the usual course of business practice, and such hardship is not to be confused with a denial of constitutional rights.

Plaintiff has contended on appeal that the trial court erroneously denied its motion for summary judgment. While this may be so, the rule is well established that, after an evidentiary trial, a previous order denying a motion for summary judgment is not reviewable on appeal, and the result of such denial be-

comes merged in the subsequent trial. *Mercer v. Sturm*, 10 Ill. App. 3d 65, 293 N.E.2d 457 (3d Dist., 1973).

Since we have found that the matters germane to this controversy do not present disputed issues of fact to be submitted to a jury, we hold that the trial court erred in not directing a verdict for plaintiff and in refusing to dismiss the counterclaim. Plaintiff's right to possession of its premises at the termination of defendants' leases on Dec. 31, 1973, is clearly established as a matter of law, and all matters pleaded and argued by defendants in their counterclaim were not germane to this proceeding. It is not necessary to consider the other errors asserted by plaintiff. We therefore reverse the verdict and judgment thereon and order that judgment be entered here for plaintiff on the complaint and that the counterclaim be dismissed.

In addition to the appeal from the proceedings in the trial court, a number of other related matters are before this court. On June 28, 1974, we ordered a temporary writ of prohibition to issue to stay all proceedings of a substantive nature pending in the Circuit Court of Peoria County until final disposition of this appeal, and the writ of prohibition was made permanent on July 26, 1974. The effect of this writ was to stay enforcement of the injunctive relief ordered by the trial court on May 6 and to vacate a temporary restraining order entered by the trial court on June 26.

On Dec. 18, 1974, plaintiff filed a motion for writ of restitution with this court, requesting that a writ issue to restore plaintiff to possession of the pro shop premises after Dec. 31, 1974. Defendants then filed a motion purportedly for protective orders which seemed merely to request an extension of time for filing of briefs and motions in response to the motion for writ of restitution. Additional time was granted, and defendants thereafter filed a motion to strike plaintiff's motion, together with an answer and jury demand. Plaintiff has also filed objections to defendants' motion for protective orders. All of these matters were taken with the appeal for decision by this court.

In its motion for writ of restitution, plaintiff asserts that the issues raised by this appeal are now moot because defendants were entitled to possession either until Dec. 31, 1973, or until Dec. 31, 1974, and thus, regardless of the outcome of this appeal, defendants' claim has now expired. It is correct that an appellate court will not review a case merely to decide abstract questions where the issues involved in the trial court no longer exist and where there is no overriding public interest. *Sullivan v. Sheehan*, 20 Ill. App. 2d 380, 156 N.E.2d 374 (1st Dist., 1959). However, at oral argument and in their pleadings in response to plaintiff's motion, defendants have rejected the suggestion that their right to possession has now expired. Thus the issue of possession is clearly not moot.

Persuasive reasons for issuance of a writ of restitution by this court in the event of reversal on appeal were presented by plaintiff at oral argument. Defendants continue in possession of the pro shops under Ill. Rev. Stat. c. 57, Sec. 22, during the pendency of this appeal. Having reversed the trial court and ordered judgment entered for plaintiff, we believe justice requires that plaintiff be promptly restored to possession. Like the court in *Bleck v. Cosgrove, supra*, we feel that "the facts disclosed by this record are insufficient to breathe new life into [defendants'] right to continue possession or to furnish the seed bed for the birth of a new lease. [Their] right to possession having expired, its prompt interment ought not be longer delayed. While this suit has not followed the course of the normal forcible entry and detainer suit, it has reached its proper port. . . ." 177 N.E. 2d at 652.

Article VI, Section 6 of the Illinois Constitution (1970) provides "The Appellate Court may exercise original jurisdiction when necessary to the complete determination of any case on review." In addition, Ill. Rev. Stat. c. 37, Sec. 35, authorizes

appellate courts to issue writs ". . . which may be necessary to enforce the due administration of justice in all matters within their jurisdiction." A writ of restitution may be issued by an appellate court to restore possession of disputed premises to those entitled to them. *Theus v. Young*, 321 Ill. App. 367, 53 N.E. 2d 298 (1st Dist., 1944).

We therefore deny defendants' motion for protective orders, deny defendants' motion to strike plaintiff's motion for writ of restitution, overrule defendants' responsive answer to plaintiff's motion, and strike defendants' demand for an appellate court jury. We direct that the clerk of this court issue a writ of restitution directed to the sheriff of Peoria County for execution in favor of the Peoria Park District, and against the defendants for possession of the golf concession shops situated at plaintiff's five golf courses in Peoria, Illinois.

Judgment for defendant reversed: judgment for possession entered for plaintiff with writ of restitution to issue. Stouder, J. and Scott, J. concur.

STATE OF ILLINOIS
APPELLATE COURT, } ss.
THIRD DISTRICT,

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of March, in the year of our Lord one thousand nine hundred and seventy-five.

(Seal)

/s/ John E. Hall
Clerk of the Appellate Court

APPENDIX K

76-14

State of Illinois

Appellate Court Third District

Ottawa

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord one thousand nine hundred and seventy-seven, within and for the Third District of Illinois:

Present—

Honorable Richard Stengel, Presiding Justice	X
Honorable Allan L. Stouder, Justice	X
Honorable Jay J. Alloy, Justice	
Honorable Tobias Barry, Justice	
Honorable Albert Scott, Justice	X
Joseph Fennessey, Clerk	
James A. Callahan, Sheriff	

Be It Remembered, that afterwards on July 18, 1977 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz.:

Case No. 76-14

Appellate Court of Illinois
Third District

A.D. 1977

Pleasure Driveway and Park District of Peoria, Plaintiff, vs. Edwin Jones, et al., Defendants.	Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois Honorable Charles W. Iben, Presiding Judge Publ. in Full

Mr. Justice Stouder delivered the opinion of the court:

Pleasure Driveway and Park District of Peoria brought this action against five golf pros to recover damages occasioned by the defendants' wrongful holdover of the golf concession pro shops at five public fee golf courses owned by the plaintiff. Defendants counterclaimed, alleging wrongful termination of their employment as greenskeepers on each of the five courses. Following a bench trial, the court entered a joint and several judgment against the golf pros in the amount of $127,605 and found for the plaintiff on defendants' counterclaim. This appeal ensued.

Only a brief summary of the events and facts preceding commencement of this action is necessary to a determination of the issues properly presented here. This litigation relates to a controversy previously before this court in *Pleasure Driveway & Park District v. Kurek*, 27 Ill. App. 3d 60, 325 N.E.2d 650, and the opinion in that case should be consulted for a more complete account of the facts.

Previous to 1974, defendants were employed by plaintiff as greenskeepers at plaintiff's five courses and were also concessionaires of the pro shops on those courses for which they paid an annual fee or rent to the Park District. From 1972 until October 1973, negotiations were conducted between the plaintiff and defendants concerning the rental fee for the pro shops and which resulted in a contract between the parties for the year 1973. Subsequent negotiations failed to produce a contract for 1974 and on January 19, 1974 the Park District awarded a three year contract for the pro shops to Golf Shops Management, Inc. (GSM), with the stated intention of continuing defendants' employment as greenskeepers. The contract with GSM was contingent upon plaintiff obtaining control of the pro shops. On January 21, 1975, each of the five golf pros was served with a 30 day written notice to terminate the tenancy of the premises occupied by the pro shops and on February 20, 1974, the Park District filed a forcible entry and detainer action to recover possession of the five pro shops. On the same date the Park Board terminated the employment of the golf pros as greenskeepers.

After a jury trial in the forcible entry and detainer action, the court ordered the plaintiff to restore the golf pros to possession of the pro shops and reinstate them as employees. This judgment was reversed in *Pleasure Driveway & Park District v. Kurek*, 27 Ill. App. 3d 60, 325 N.E.2d 650. In that appeal this court held that the golf pros' right to possession of the pro shops ended on December 31, 1973 and that the golf pros' employment as greenskeepers was not germane to the question of their right to possession of the pro shops, but instead was a separate contractual relationship. A writ of restitution was issued by the court restoring possession to plaintiff, but

was recalled upon order of the Illinois Supreme Court pending a determination of an appeal to that court. Petition for leave to appeal was denied on May 27, 1975 and a second writ of restitution issued on June 30, 1975, restoring possession of the pro shops to the park district.

The present action was filed on July 25, 1975 to recover money damages from the defendants for their wrongful possession of the pro shops from January 1, 1974 until June 30, 1975. The original complaint was amended to include a claim under paragraph 2 of chapter 80 for damages equal to double the yearly value of the land. (Ill. Rev. Stat. 1975, ch. 80, par. 2.) Defendants answered and filed six affirmative defenses which were stricken by the trial court upon plaintiff's motion. Defendants also counterclaimed, seeking restoration of their positions as greenskeepers and back pay from the date their employment was terminated. Plaintiff filed a motion for summary judgment on the issue of liability, relying on our decision in *Kurek* and the trial court granted the motion.

After a bench trial, the trial court refused to award the double damages requested by plaintiff under chapter 80, paragraph 2, but did allow plaintiff damages and used the earlier contract with GSM as a measure of those damages. The court found no merit in defendants counterclaim and entered judgment in favor of plaintiff thereon. Separate appeals were taken from the trial court's judgment by each of the defendants, but were later consolidated into the present appeal. Plaintiff filed a cross-appeal from the trial court's refusal to award double damages.

Following oral arguments and while this case was under advisement to this court, the Circuit Court of Appeals for the Seventh Circuit rendered its opinion in *Kurek v. Pleasure Driveway & Park District* (Docket No. 76-1791, May 26, 1977) (7th Cir. 1977), — F.2d —. The five golf professionals who are defendants in this action had filed a complaint in federal

court seeking money damages for an alleged violation of federal antitrust laws by the defendants (Pleasure Driveway & Park District, the plaintiff in this cause, and other individual named defendants who are not parties to this action) and for violation of the plaintiffs (defendants herein) civil rights under 42 USC 1983. The golf professionals alleged in district court that their right to petition had been violated when their employment as greenskeepers had been terminated. We have allowed the golf professionals motion to add the opinion of the Seventh Circuit Court of Appeals as additional authority and will refer to that decision as needed.

Defendants assert that the trial court committed reversible error when it dismissed the affirmative defense that *Pleasure Driveway & Park District v. Kurek*, 27 Ill. App. 3d 60, 325 N.E.2d 650, was procured by fraud and when it entered summary judgment against defendants on the issue of liability because of that decision. Of the affirmative defenses specified in defendants' answer, error is asigned on appeal only as to the affirmative defense of fraud. However, in their motion to add as additional authority the opinion of the Seventh Circuit Court of Appeals previously referred to, defendants argue that since the Seventh Circuit Court of Appeals has decided that the plaintiff may be subject to damages for antitrust violations, we should reverse the trial court's dismissal of defendants' affirmative antitrust defenses. We decline to do so. Having failed to initially allege and argue the dismissal of the antitrust defense, defendants have waived whatever assignment of error they might have had to that dismissal. We therefore do not consider whether the affirmative antitrust defense alleged was meritorious.

The specific fraudulent acts alleged in the affirmative defense is that plaintiff fraudulently failed to provide a complete record on appeal in *Kurek*, and but for the omissions occurring in the record, this court would have affirmed the lower court's decision in defendants' favor. Defendants' arguments are without merit.

Supreme Court Rules 322 and 329 (Ill. Rev. Stat. 1975, ch. 110A, pars. 322 and 329) provide ample means to insure a true record is before the Appellate Court and it was defendants' responsibility to cure whatever inaccuracies, if any, that might have existed in the record. Having failed to do so, defendants cannot now claim that this court's decision in *Kurek* was procured by fraud because of alleged deficiencies in the record.

The next issue relates to the complaint. Defendants contend that the judgment of the trial court was wrong as a matter of law and present three reasons in support of their position. We will consider each of these arguments separately.

First, defendants argue that because the amended complaint "cites section 2, chapter 80 of the Illinois Revised Statutes in support of its claim for damages," the complaint seeks relief only under that statute. Defendants contend that the trial court found that defendants did not wilfully holdover (as required by section 2) and since the complaint is based solely on that statute, plaintiff was not entitled to judgment.

Upon examination of the amended complaint, it becomes evident that the defendants' view of the complaint is too narrow. We find nothing which indicates that plaintiff was requesting relief solely under section 2 to the exclusion of all other relief. To the contrary, the complaint clearly alleges that by reason of the defendants' wrongful holdover, the plaintiff has been deprived of the fair rental value of the concession shops, and sustained damages because of its inability to honor contractual commitments. Hence, the claim for double rent under section 2 is merely cumulative to the plaintiff's basic claim for fair rental value and consequential damages.

Next, defendants claim that plaintiff has failed to sustain its burden of proof as to damages because the trial court was unable to ascertain the exact amount of fair rental value. By so asserting, defendants suggest that the only measure of damages for wrongful holdover is fair rental value. We do not find such to be the law in Illinois. While it is generally true that fair rental value is often used as a correct measure of damages for wrongful holdover, it is by no means the only measure of damages (*Rhodes v. Sigler*, 44 Ill. App. 3d 375, 357 N.E.2d 846, *Leave to Appeal Denied; Ash v. Barret*, 1 Ill. App. 3d 414, 274 N.E. 2d 149. See generally 32 ALR 2d 582), except when relief is awarded under section 2 of chapter 80. (Ill. Rev. Stat. 1975, ch. 80, par. 2.) Lost Profits (*Rhodes v. Sigler*, 44 Ill. App. 3d 375, 357 N.E.2d 846, *Leave to Appeal Denied*) and out of pocket expenses (*Ash v. Barret*, 1 Ill. App. 3d 414, 274 N.E. 2d 149) are properly cognizable in an action for wrongful holdover. We believe the trial court properly used as a measure of damages a single sum composed of rental value and the value of an exclusive license. The trial court properly added to this sum the plaintiff's costs of paying personnel to perform duties which GSM would have performed under the contract, costs which were reasonably foreseeable and would not have been incurred but for defendants' wrongful holdover. We find the trial court's determination of damages within the law and supported by the evidence.

Defendants remaining objection relates to the joint and several nature of the judgment. The five defendants are jointly and severally responsible for the $127,605 judgment. They contend that since each golf pro was a tenant of a particular concession shop under an individual lease agreement between the respective pro and Park District, their liability, if any, can only be several. Hence, any joint and several judgment is erroneous as a matter of law and must be reversed. We disagree.

During the period of negotiations from 1973 until the present appeal, defendants have consistently acted in concert. Through one common agent, the golf pros sought to improve the compensation they received as concessionaires of the pro shops and from their employment as greenskeepers. While this

alone would not necessarily establish the joint and several character of defendants' actions, further conduct by the defendants justifies the joint and several nature of the judgment. Throughout the entire course of litigation which has spanned over three years and encompassed over fifteen different judicial proceedings in both state and federal courts, defendants have prosecuted and defended these actions jointly and severally. Only after entry of the judgment in this case did defendants file any pleadings or make any indication that they wished to be treated separately and not as a group. Having chosen to ally themselves into a single group and to prosecute and defend numerous legal actions arising out of the same fundamental dispute without once acting independently in that dispute, defendants cannot divorce themselves from their earlier conduct and elect to be treated severally. The trial court was correct in ordering a joint and several judgment.

As concerns the counterclaim, the golf pros contend that the trial court's finding that they were discharged because they refused to voluntarily vacate the pro shops establishes that defendants were penalized for exercising rights secured to them under the petition and due process clauses of the 1st and 14th amendments to the United States Constitution. Defendants claim that either their right to continue employment is protected by due process or in the alternative, that their dismissal abridged their right to petition.

In support of the contention that defendants' dismissal abridged their right to petition, defendants direct us to the Seventh Circuit Court of Appeals decision previously mentioned. (*Kurek v. Pleasure Driveway & Park District* (Docket No. 76-1791, May 26, 1977), (7th Cir. 1977) — Fed.2d —.) The Seventh Circuit Court of Appeals held, *inter alia*, that the substance of Count 2 of defendants' federal complaint had not been previously disposed of by the judgment of the circuit court of Peoria County, contrary to what had been decided by the district court. The judgment of the circuit court of Peoria County referred to above is the same judgment which forms the basis of this appeal. Upon the motion of defendants, we have allowed the opinion of the Seventh Circuit Court of Appeals to be cited as additional authority. We have examined that opinion to determine whether the substance of the issues presented by defendants' claimed denial of the right to petition was reached by the Seventh Circuit in their opinion. Upon an examination of that opinion, we find the only issue reached was whether Judge Iben of the circuit court of Peoria County had decided adversely to the golf pros the critical facts pertinent to the golf pros claim under 42 USC 1983. The Seventh Circuit found that Judge Iben had not disposed of the golf pros' claim or of critical facts pertinent to it and reversed and remanded the cause for further proceedings. The Seventh Circuit Court of Appeals therefore did not decide the issues raised by defendant golf pros on this appeal. From a review of defendants brief in this cause, of which the Circuit Court of Appeals was unaware, all the reasons why defendants discharge should be considered wrongful were or could have been urged and resolved in the case before the circuit court of Peoria County.

While defendants claim a protectable property interest in their employment, they fail to support their conclusion by either argument or reference to facts which might indicate the existence of such an interest. In *Board of Regents of State College v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701, after discussing cases dealing with 14th Amendment property interest, the Court stated:

> "Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577, 33 L.Ed.2d at 561, 92 S.Ct. at . . . .

The Court held that a non-tenured professor teaching at a state university did not have an interest in continued employment which was encompassed within the 14th Amendment's protection of liberty and property. We find nothing in the record or in defendants brief to demonstrate why a different result should be reached here. Furthermore, while various procedures give all Park District employees the right to present grievances to the Park District, the defendants failed to avail themselves of such an opportunity.

Nor can we agree with the defendants that their dismissal as greenskeepers violated their constitutional right to petition. The Forcible Entry and Detainer Act (Ill. Rev. Stat. 1975, ch. 57, par. 1 *et seq.*) gave defendants a right to remain on the leased premises while presenting their defenses to the Forcible Entry and Detainer action which had been commenced by plaintiff, a right which the defendants utilized to stay in possession for over 18 months past the expiration of their lease. But the election to pursue a certain course of conduct guaranteed by statute or federal and state constitutions is not always without adverse consequences. Not only does the constitution guarantee to everyone the right to petition, it also grants employers and employees alike certain rights in deciding whether or not to associate with one another in an employment relationship. As was aptly stated in *Mitchell v. Stanolind Pipe Line Co.* (10th Cir. 1950), 184 F.2d 837:

> "It is not the function of the courts in the absence of a contract to compel a person to accept or retain another in his employ, nor is it the function of courts to compel any person against his will to remain in the employ of another." 184 F.2d at 838.

In the absence of contract or statutory provision, an employer may discharge an employee without cause or reason or for any cause or reason. (*Odell v. Humble Oil & Refining Co.* (10th Cir. 1953), 201 F.2d 123; *Mitchell v. Stanolind Pipe Line Co.*

(10th Cir. 1950), 184 F.2d 837.) In *Mitchell* an employee was warned by his employer that if he brought a tort action for assault and battery against a fellow employee to recover damages, his employment would be terminated. The employee commenced the action against his fellow employee and was immediately discharged. The court rejected the employee's claim for damages based upon an alleged violation of the employee's right to petition. We hold that defendants' right to petition was not abridged when their employment was terminated. To hold otherwise would force plaintiff and the defendants to associate with one another in a non-consensual relationship. Absent contract or statutory provision, plaintiff was free to discharge defendants. The trial court's judgment in favor of plaintiff on the defendants' counterclaim was well supported by both the law and the evidence.

What remains is plaintiff's cross-appeal which claims that double damages under paragraph 2 of chapter 80 should have been awarded. (Ill. Rev. Stat. 1975, ch. 80, par. 2). We note initially that a notice of cross-appeal had been filed by plaintiff as to only one defendant, Richard Hoadley. We therefore dismiss plaintiff's cross appeal as to the following defendants; William Kurek, Walter Turdele, Robert Togikawa, and Edwin Jones. We will determine the merits of plaintiff's cross-appeal as to defendant Hoadley.

Before double damages may be awarded under Ill. Rev. Stat. 1975, ch. 80, par. 2, the plaintiff must prove that the defendants' holding over was wilful. Paragraph 2 is essentially punitive in nature (*Stuart v. Hamilton*, 66 Ill. 253) and should be applied cautiously. We believe that such a punitive award is not applicable to situations where a bona fide dispute exists between the parties as to who had the right of possession. Here, there can be little doubt as to the bona fides of the controversy between the golf professionals and the park district in light of the original adjudication by the circuit court of Peoria County that the

golf pros were entitled to possession. While that judgment was reversed by this court in *Pleasure Driveway & Park District v. Kurek*, 27 Ill. App. 3d 60, 325 N.E.2d 650 thereby making the golf pros responsible for damages caused by their holdover, that initial determination did conclusively establish the bona fides of the defendants' position and render section 2 inapplicable. The trial court's order denying double damages is supported by the evidence.

For the foregoing reasons the judgment of the circuit court of Peoria County is affirmed.
Judgment affirmed.

STENGEL, P. J. and SCOTT, J., concur.

State of Illinois,
Appellate Court, } ss.
Third District,

..... as Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 18th day of July, in the year of our Lord one thousand nine hundred and seventy-seven.

JOSEPH FENNESEY
Clerk of the Appellate Court

APPENDIX L

No. 76-14

In the Appellate Court of Illinois, Third District

Pleasure Driveway and Park District of Peoria, Plaintiff-Appellee, vs. Edwin Jones, et al., Defendants-Appellants.	Appeal from the Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County. Honorable Charles W. Iben, Presiding Judge.

MOTION FOR LEAVE TO FILE ADDITIONAL AUTHORITY AND FOR OTHER INCIDENTAL RELIEF

Now come defendants-appellants and state and suggest to and move the Court as follows:

1. This case was argued on January 12, 1977 and insofar as is presently known it is still under advisement.

2. On May 26, 1977, the United States Court of Appeals for the Seventh Circuit handed down its opinion in *Kurek, et al. v. Pleasure Driveway & Park District of Peoria, et al.* [7th Cir. No. 76-1791 (5/26/77)] and a true and complete copy is appended hereto as Exhibit A.

3. The subject matter and decisions reflected by Exhibit A hereto are directly connected with and relevant to the subject matter and issues pending on review in this appeal and should

be considered by this Court as part of its decisional processes, *viz*:

(a) The trial court in this case rejected defendants' affirmative antitrust defenses and Exhibit A hereto holds that the PARK DISTRICT is indeed subject to liabilities under the antitrust laws.

(b) The trial court in this case measured defendants' liabilities under the complaint on the basis of what is referred to in Exhibit A hereto, *inter alia*, as follows: "that GSM made an economically unrealistic 'sham' proposal, not actually to be put into effect, in concert with at least some Park District officials, knowing that the proposal would not be acted upon as indicated in the bid invitation but would, instead, be used by the Park District to coerce plaintiffs (defendants here) into conduct violative of the antitrust laws." [Exhibit A, p. 18].[1]

(c) Should this Court affirm the judgment against these defendants on the complaint then, in light of Exhibit A hereto, the PARK DISTRICT, as such, as well as its individual officers, attorney and administrative staff would be subject to liabilities under section 4 of the Clayton Act [15 U.S.C. § 15] for treble that amount, or for $382,815 and any such result would be incongruous and would be likely to hold the law and judicial processes up to public disrepute.

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[1] When this case was tried in the court below, GSM had no operational track record. This fact in tandem with its substantial subsidies in Park District funds, property and credit during the pendency of the appeal now reflected by *Pleasure Driveway & Park District v. Kurek*, 27 Ill.App.3d 60 (3rd Dist. 1975) made it impossible to do more than speculate as to whether "GSM made an economically unrealistic 'sham' proposal". Subsequent transactions and events can now establish "an economically unrealistic 'sham' proposal" by hard evidence.

4. Furthermore, the opinion of the 7th Circuit with regard to the employment terminations [Exhibit A, pp. 20-23] should be considered by this Court with regard to the judgment on review on the counterclaim involving the same subject matter, *viz*:

(a) The PARK DISTRICT is not a person under 42 U.S.C. § 1983 and "was properly dismissed out as a defendant" in the federal proceeding. [Exhibit A, p. 21.]

(b) But the opinion of the 7th Circuit seems to hold that the finding of Judge Iben here on appeal together with relevant legal principles under the Illinois Forcible Entry & Detainer Act [Exhibit A, pp. 21-22], establishes that defendants' employment terminations violated their rights under the Petition and Due Process Clauses of the 14th Amendment to the Constitution of the United States *a fortiori* subject the PARK DISTRICT officers, attorney and administrative staff to individual liabilities under 42 U.S.C. § 1983.

(c) The fact that the PARK DISTRICT as such is not subject to federal jurisdiction in the circumstances of this case [See: *Aldinger v. Howard*, 427 U.S. 1] does not exempt it from *respondeat superior* liability for the constitutional torts of its officers, attorney and administrative agents under Illinois law, even where the misconduct of the tort-feasing agents is knowing, malicious and intentional. [See e.g.: *City of Rock Falls v. Chicago Title & Trust*, 13 Ill.App.3d 359, 363-364 (3rd Dist. 1973); *Young v. Hansen*, 118 Ill.App.2d 1, 9 (2nd Dist. 1969)].

(d) Thus, it would be constitutionally, legally and intrinsically contradictory for the PARK DISTRICT officers, attorney and administrative agents to be held liable for these defendants' employment terminations on the basis of Judge Iben's findings in the federal proceedings and for the PARK DISTRICT to escape *respondeat superior* lia-

bility on precisely the same finding under the counterclaim here.

5. Under Rule 40 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1254(1) the judgments and opinion of the 7th Circuit [Exhibit A] are subject to rehearing and certiorari procedures and ordinarily we would await the exhaustion of those processes, but in light of the length of time this appeal has been under advisement together with the manifestly direct involvement the 7th Circuit's decisions have with this case, we perceive it as our duty to bring Exhibit A hereto, to this Court's attention without delay.

6. There is one other reason why the opinion of the 7th Circuit is material to the proceedings pending here. Over our objection, plaintiff-appellee was permitted to file a "Supplemental Record On Appeal" which included the June 1, 1976 "Decision & Order" of United States District Judge Robert D. Morgan in *Kurek, et al. v. Pleasure Driveway & Park District of Peoria, et al.* [S.D.Ill.N.D., No. P.Civ. 76-9]. With the exception of the 2 points under the Civil Right Counts which we suggested for affirmance (Exhibit A, p. 21), the attached opinion and judgments of the 7th Circuit [Exhibit A] reverse the foregoing "Decision & Order" in all respects.

Wherefore, defendants-appellants move for an order or orders granting one, or more, of the following:

(1) That they be authorized to file Exhibit A hereto as additional authority concerning the merits of their contentions in this appeal.

(2) That they be permitted to supplementally brief and reargue the appeal in light of Exhibit A hereto and of its impact and effect on the merits.

(3) That such other and further orders as this Court may deem just and appropriate in light of Exhibit A hereto, be entered.

Respectfully submitted,

JOHN E. CASSIDY, JR.
800 Lehmann Building
Peoria, Illinois 61602
Telephone: 309/676-0591
Attorney for Appellants

Subscribed and sworn to before me this 31st day of May, 1977.

F. B. KOWALSKE
Notary Public
Peoria County, Illinois

APPENDIX M

In the Circuit Court of the Tenth Judicial Circuit of Illinois
Peoria County

Pleasure Driveway and Park District of Peoria, Plaintiff, v. William Kurek, et al., Defendant.	Case No. 75 L 2893

ORDER

Clerk's Copy—White
Plaintiff's Copy—Yellow
Defendant's Copy—Pink

In accordance with the Memorandum of Decision filed herein, Judgment is hereby entered in favor of the Pleasure Driveway and Park District and against William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones and Richard Hoadley, and each of them in the amount of $127,605.00 and costs of this action on the complaint. It is further Ordered that Judgment is entered in favor of the Pleasure Driveway and Park District and against William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones and Richard Hoadley, and each of them on the counterclaim.

November 14, 1975

/s/ CHAS. IBEN
Judge of the Tenth Judicial Circuit

(Filed Nov. 14, 1975)

Approved as to form
Julian E. Cannell

Memorandum of Decision

The decision in this case must rest on the opinion of the Appellate Court in case 74-127, affirmed by the Illinois Supreme Court. It follows also case No. 75 L 2893 in this Court, granting summary judgment on the question of liability for damages to the Plaintiff. The questions here to be decided are: one, the amount of damages sustained by the Plaintiff Park District; and, two, the Counterclaim of Defendants for damages.

The Appellate Court found the Plaintiff entitled to possession after December 31, 1973 of the pro shop premises on Plaintiff's golf courses. This Court finds that the Plaintiff gave notice of its intention to take possession at that time. But because of continuing negotiations between the parties, the Plaintiff permitted the Defendants to hold possession during the month of January. This Court finds a month-to-month tenancy thereby created. When negotiations were broken off in January Plaintiff made further demand for possession. Allowing for the requisite 30-day notice, this entitled the Plaintiffs to possession March 1. A measure of the fair value of the premises and/or licenses for concession rights were shown by the evidence to be the payment of $2,916.67 per month by a third party, arrived at by an arms-length, open bid. In addition, thereto, the Plaintiff suffered the loss of $80,647.31 to be paid to so-called inside starters at the golf courses in lieu of rent or further remuneration by the third party. This cost was previously borne by the Park District. The Court finds the loss to Plaintiff based on the rental and/or license value as fixed by what others were willing to pay at $127,605.80.

How much, then, of this amount represents rent within the statute and how much the value of concession rights? Clearly some value received was in a license. The concessionaires, if not by explicit contract terms, had exclusive rights to operate commercially on the golf courses. This included the rental of

golf carts not necessarily dependent upon their being housed on golf course property, the right to give lessons, etc. There was no evidence to enable the Court to determine what portion of the value was rent. In the absence of such proof the question must be presumed against the party who failed to adduce it.

There is a further impediment to the claim for doubling the damages. There is no question that the case law in Illinois, as defined in one case of Alexander v. Loeb, 230 Ill. 454, provides for the doubling of rental value in this situation. Research indicates, however, that this holding of this old Illinois law is out of line with holdings in several other states with similar statutes. See Corpus Juris. There the interpretation of the word "willful" has precluded the doubling of damages where the person holding over does so in good faith, with a reasonable legal dispute over possession. It is hard to think of any more reasonable dispute than where, in the present case, a judgment of the Circuit Court in fact was entered in the Defendants' favor at an early stage. This Court is inclined to hold that Illinois would not persist in calling such a holding over "willful".

The question remaining is the Defendants' Counterclaim. Citing dicta in Powell v. Jones, they claim some due process to the Defendants in their discharge from positions of Golf Course Managers/Pro Greenkeepers. The terms of the policies, rules and regulations of the Park District, Defendants' Exhibit 15A, would seem, further, to form some contractual basis of Defendants' employment.

Defendants were notified of their discharge from their Golf Course Managers/Pro Greenskeepers possession on February 20, 1974. The language of the notification reflected the general written policy of the Board for disciplinary discharges. A spelling out of these reasons came in a Park District press release, Defendants' Exhibit 17. This Court had no evidence Defendants, in fact, received the press release, or that it came to their

notice. "However, the reason for their termination clearly appears to have been the Defendant's insistence on remaining in the golf shop premises. There is abundant evidence that they stubbornly and intractably insisted through litigation, and other ways, on this claim, spurning other avenues. They can have had no doubt about the reason for their discharge, i.e. their refusal to give up the premises. They did not, moreover, avail themselves of their right to present any grievances to the District under procedures provided. Their only course was to persist in the courts. This Court must hold they must abide the risks of that, and the outcome. This Court finds, therefore, for the plaintiff on the Defendants' Counterclaim." Should, however, better authority decide differently, the Court finds the Golf Course Managers/Pro Greenskeepers salaries to have been, on an annual basis: Kurek, $11,130; Durdle, $9,782; Jones, $9,782; Togikawa, $9,781; Hoadley, $8,648; all for the period of January 1, 1974, through July 3, 1975.

In addition to the damages of $127,605 found for Plaintiff must be added the previously agreed payment due from Defendants for the period of January 1 through March 1, 1974, if any.

Allocating the damages of the Plaintiff for the period after April 25, 1975, the Court finds that portion of the damages to be $34,796.

APPENDIX N

In the Circuit Court of the Tenth Judicial
Circuit of Illinois
Peoria County

William Kurek, et al., Plaintiffs, vs. Golf Shop Management, Inc., an Illinois Corporation, Defendant,	Case No 75 M 3128
Pleasure Driveway and Park District of Peoria, Peoria, Illinois, an Illinois political subdivision, Third Party Plaintiff, vs. William Kurek, et al., Third Party Defendants.	Case No. 75 E 3231 Consolidated

INJUNCTION ORDER AND JUDGMENTS

(Filed Sept. 3, 1975)

Now on this 21st day of August, 1975, comes the Plaintiffs and Third Party Defendants, William Kurek, Walter Durdle, Edwin Jones, Robert Togikawa and Richard Hoadley, by their attorney, John E. Cassidy, Jr., of Cassidy, Cassidy & Mueller and Third Party Defendant, John E. Cassidy, Jr., pro se and comes also the Defendant, Golf Shop Management, Inc., an Illinois corporation, by its attorney, J. Michael Mathis, and comes also the Third Party Plaintiff, Pleasure Driveway and

Park District of Peoria, Peoria, Illinois, an Illinois political subdivision, by its attorney, Joseph Z. Sudow, of Kavanagh, Scully, Sudow, White & Frederick.

And it appearing to the Court that the Plaintiffs, William Kurek, Walter Durdle, Robert Togikawa, Edwin Jones and Richard Hoadley, hereinafter called "Golf Pros", heretofore commenced this action No. 75 M 3128 by filing their Complaint in Forcible Entry against the Defendant, Golf Shop Management, Inc., an Illinois Corporation.

And it further appearing to the Court that the Third Party Plaintiff, Pleasure Driveway and Park District of Peoria, Peoria, Illinois, an Illinois political subdivision, hereinafter called "Park Board", commenced an action in case number 75 E 3231 by filing its verified Complaint for Injunction against the Third Party Defendants, William Kurek, Walter Durdle, Edwin Jones, Robert Togikawa, Richard Hoadley and John E. Cassidy, Jr., and on Motion of the said Third Party Defendants said action was consolidated with this cause and a stipulation entered that the Complaint in consolidated Case No. 75 E 3231 would stand as a Third Party Complaint and the Third Party Defendants' Appearance, Answer and Affirmative Defense to that Complaint would stand as its appearance, Answer and Affirmative Defense to the Third Party Complaint as consolidated herein and that all parties had completed the offering of any evidence and law, and submitted the issues raised in said pleadings to the Court.

And the Court having examined the files and records in these causes and in this consolidated cause and having heard evidence and taken judicial notice of the portions of the common law record in Case No. 74 M 602 as pointed out by the Golf Pros, the opinion of the Appellate Court in its Case No. 74-127, the decisions of the Supreme Court in its Case No. 47469, and the various pleadings and motions filed in the Appellate and Supreme Courts, including those orders of the latter Court denying the Golf Pros' two petitions for leave to file original actions and

two petitions for leave to appeal, and the arguments of counsel for all parties;

And now being fully advised in the premises finds that each of the Defendants in this cause and each of the Third Party Defendants have been duly and properly brought before the Court either through service of summons or entry of appearance or personal appearance, all in the manner provided by the law; that due and proper notice has been given to each of the Plaintiffs, the Defendant, the Third Party Plaintiff and each of the Third Party Defendants during the progress of this cause as required by law with the parties at all times being present in open Court either in person or by their respective attorneys; and this Court has acquired and now has jurisdiction of all the parties to this cause and the subject matter hereof in both Case No. 75 M 3128 and Case No. 75 E 3231.

And it now appearing to the Court that the Plaintiffs, Golf Pros, have duly filed their Motion for Summary Judgment for the Plaintiffs and against the Defendant, GOLF SHOP MANAGEMENT, INC.;

And it further appearing to the Court that the Defendant, GOLF SHOP MANAGEMENT, INC., has duly filed its Motion for Dismissal of the Plaintiffs' Complaint with prejudice and its motion for a reasonable attorneys' fees and expenses for the Defendant and against the Golf Pros, pursuant to Statute (Chapter 110, Illinois Revised Statute, Section 41);

And it further appearing to the Court that the Third Party Plaintiff, Park Board, has duly filed its Motion for a Temporary Injunction based on the verified Complaint herein against the Third Party Defendants and its motion for a reasonable attorneys' fees and expenses pursuant to Statute (Chapter 110, Illinois Revised Statute, Section 41);

And this cause coming on now to be heard upon the said Golf Pros' Complaint and Motion for Summary Judgment; the

Motion to Dismiss with prejudice by the Golf Shop Management, the Third Party verified Complaint for Injunction of the Park Board, and the Answer and Affirmative Defense of the Golf Pros, and John E. Cassidy, Jr., as Third Party Defendants, the Motion for a Temporary Injunction by the Park Board, the Section 41 Motion for reasonable attorneys' fees and expenses by the Golf Shop Management, Inc., the Section 41 Motion for reasonable attorneys' fees and expenses by the Park Board, and upon all other pleadings, exhibits, items of judicial notice and all other matters of record herein;

And it further appearing to the Court that due notice of the presentation of this Decree has been given to all parties entitled thereto and the Court having heard the arguments of counsel and having taken further evidence as to the amount of the attorneys' fees and expenses sustained by the Golf Shop Management and by the Park Board, and being fully advised in the premises, makes the following findings of fact:

1. That the allegations made by the Golf pros in their Complaint Motion for Summary Judgment, Answer and Affirmative Defense have been previously litigated and considered on numerous times, and have been and are finally adjudicated by the Third District Appellate Court of Illinois in its opinion in Case Number 74-127 and by the Supreme Court of Illinois in its denial of two separate petitions for leave to file original actions, and two separate petitions for leave to appeal in its Case Number 47469.

2. That the issues raised by the Golf Pros in the aforesaid pleadings have been determined by the aforesaid reviewing courts by means of said final judgment and orders.

3. That the Golf Pros allegations in Paragraph 3 of their complaint and paragraph 1 of their Motion for Summary Judgment are made without reasonable cause and not in good faith and are found to be untrue in that they mis-

represent and directly contradict the said final judgment of the Third District Appellate Court in its Case Number 74-127 and the orders of the Supreme Court of Illinois in its Case Number 47469.

4. That the Golf Pros' allegations in paragraph 4 of their Complaint and paragraph 2 of their Motion for Summary Judgment are made without reasonable cause and not in good faith, and are found to be untrue in that they misrepresent the issues previously litigated and finally adjudicated by the aforesaid courts.

5. That the Golf Pros have without reasonable cause and not in good faith, made allegations, found to be untrue, that certain matters were not previously litigated when, in fact, the aforesaid Courts had considered the matters and adjudicated them, which adjudications had become final.

6. That the allegations made by the Golf Pros as Third Party Defendants in paragraphs 3, 4, and 5 of their Answer and Affirmative Defense were made without reasonable cause and not in good faith, and found to be untrue in that they purport to represent finally adjudicated facts which are in direct contradiction to the said final judgments of the Third District Appellate Court of Illinois in its Case Number 74-127 and the Supreme Court of Illinois in its Case Number 47469.

7. That the Golf Pros have used such allegations and misrepresentations to harass the Park Board by vexatious and harassing litigation on issues previously and finally adjudicated.

8. That the Golf Pros have engaged in vexatious and harassing litigation against the Park Board on the issue of possession and operation of the property referred to in the verified Complaint as the Golf Course Concession Shops.

9. That the Park Board and the public has been and will continue to be irreparably injured, suffering serious financial injury and inconvenience, by such vexatious or harassing and continued litigation.

10. That the Park Board has no adequate remedy at law to prevent such vexatious and harassing litigation or the injury and inconvenience resulting therefrom.

11. That the Defendant, Golf Shop Management, Inc., has actually incurred expenses and attorneys' fees in the amount of FIVE HUNDRED DOLLARS ($500.00) by reason of being harassed and forced to defend a law suit based upon the said untrue pleadings of the Golf Pros as Plaintiffs and the Court having heard evidence thereon finds that amount reasonable.

12. That the Park Board has actually incurred expenses and attorneys fees in the amount of SIXTEEN HUNDRED THIRTY-EIGHT DOLLARS ($1,638.00) by reason of being harassed and becoming a party to continued and vexatious proceedings based upon the untrue pleadings of the Golf Pros as Plaintiffs and as Third Party Defendants, and the Court having heard evidence thereon, finds that amount reasonable.

13. That in all respects JOHN E. CASSIDY, JR., named as a Third Party Defendant has been acting solely as attorney for the Golf Pros and by virtue thereof should not be considered as a party in these proceedings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Golf Pros' (Plaintiffs') Motion for Summary Judgment be and the same is hereby denied.

IT IS FURTHER ORDERED that the Golf Shop Management, Inc.'s Motion to Dismiss Plaintiffs' Complaint with prejudice be and the same is hereby sustained and said Complaint is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that Golf Shop Management, Inc.'s Motion for reasonable attorneys' fees pursuant to Rule 41 be and the same is hereby sustained and that the Golf Pros thereby be summarily taxed for reasonable attorneys' fees in the sum of FIVE HUNDRED DOLLARS ($500.00) and judgment is hereby entered accordingly in favor of Golf Shop Management, Inc. against WILLIAM KUREK, WALTER DURDLE, EDWIN JONES, ROBERT TOGIKAWA and RICHARD HOADLEY: and EXECUTION MAY ISSUE.

IT IS FURTHER ORDERED that JOHN E. CASSIDY, JR. be stricken as a Third Party Defendant.

IT IS FURTHER ORDERED that the Park Board's Motion for a Temporary Injunction, restraining and enjoining the Third Party Defendants, WILLIAM KUREK, WALTER DURDLE, EDWIN JONES, ROBERT TOGIKAWA and RICHARD HOADLEY, and each of them, together and their agents, servants and attorneys and all persons acting in concert or participating with them or with any one of them who receive actual notice of this Order by personal service or otherwise, from prosecuting any litigations involving the ownership or possession (except claims for damages, if any) of or interfering with the operation of the property referred to in the verified Complaint as the Golf Course Concession Shops and the ancillary buildings located at:

Northmoor Golf Course, 5805 N. Knoxville Ave., Peoria, Ill.

Kellogg Golf Course, 1212 Kickapoo Terrace, Peoria, Ill.
Newman Golf Course, 2021 W. Nebraska, Peoria, Ill.
Detweiller Golf Course, 8412 N. Galena Road, Peoria, Ill.
Madison Golf Course, 2735 W. Seventh Street, Peoria, Ill.

IT IS FURTHER ORDERED that such Injunction issue without bond pursuant to statutory exemption (Chapter 69, Illinois Revised Statute, Section 9).

IT IS FURTHER ORDERED that the Park Board's Motion for expenses and reasonable attorneys' fees be and the same is hereby sustained and that the Third Party Defendants thereby be summarily taxed for reasonable attorneys' fees and expenses in the amount of SIXTEEN HUNDRED THIRTY-EIGHT DOLLARS ($1,638.00) and judgment is hereby entered accordingly in favor of PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, Peoria, Illinois, against WILLIAM KUREK, WALTER DURDLE, EDWIN JONES, ROBERT TOGIKAWA and RICHARD HOADLEY; and EXECUTION MAY ISSUE.

IT IS FURTHER ORDERED on the basis of the Golf Pros' waiver of all notice requirements and on the Motion of Park Board that said Temporary Injunction be made permanent and that a permanent Writ of Injunction be issued by the Clerk of this Court restraining and enjoining the Third Party Defendants, WILLIAM KUREK, WALTER DURDLE, EDWIN JONES, ROBERT TOGIKAWA and RICHARD HOADLEY, and each of them together with their agents, servants, and attorneys, and all persons acting in concert or participating with them or with any one of them who receive actual notice of this Order by personal service or otherwise from prosecuting any litigation involving the ownership or possession of or interfering with the operation of the property referred to in the verified Complaint as the Golf Course Concession Shops and the ancillary buildings located at:

Northmoor Golf Course, 5805 N. Knoxville Ave., Peoria, Ill.
Kellogg Golf Course, 1212 Kickapoo Terrace, Peoria, Ill.
Newman Golf Course, 2021 W. Nebraska, Peoria, Ill.
Detweiller Golf Course, 8412 N. Galena Road, Peoria, Ill.
Madison Golf Course, 2735 W. Seventh Street, Peoria, Ill.

Entered: Sept. 3/75

CHAS. IBEN
The Honorable Charles Iben

APPENDIX O

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

August 25, 1977

Before

Hon. Wilbur F. Pell, Circuit Judge

William Kurek, et al., Plaintiffs-Appellants, No. 76-1791 vs. Pleasure Driveway and Park District of Peoria, Illinois, etc., et al., Defendants-Appellees.	Appeal from the United States District Court for the Southern District of Illinois, Peoria Division. No. P-Civ.-76-9 Judge Morgan

This matter comes before the court on the "RESPONSE TO MOTIONS TO STAY MANDATE" filed herein on August 24, 1977 by counsel for the plaintiffs-appellants. Treating said response as a motion to reconsider this court's order of August 27, 1977,

IT IS ORDERED that said motion be and the same is hereby DENIED. Plaintiffs-appellants' request for alternative relief is premature since it does not appear that the enforcement and collection of the state court judgment is imminent. The parties are directed however, to notify the court of any collection efforts made while the mandate resides in the Seventh Circuit. Accordingly, the request for alternative relief is DENIED at this time.

APPENDIX P

In the United States District Court
Southern District of Illinois
Southern Division

William Kurek, Walter Durdle, Robert Togikawi, Edwin Jones, and Richard Hoadley, Plaintiffs, v. Pleasure Driveway and Park District of Peoria, Illinois, et al., Defendants.	No. P-CIV-76-9.

Decision and Order on Motion for Leave to File Amendment to Complaint and Motion to Open, Alter or Amend

(Filed June 30, 1976)

Plaintiffs' third complaint in this court, involving essentially the same subject matter, was finally dismissed on defendants' motion on June 1, 1976, through a written decision which it is unnecessary to repeat. The present motions seek supplementation of that complaint, with a proposed Count III, and revision of that decision of this court.

The court simply cannot justify detailed response to the assertions in some thirty-five pages of text of said motions and proposed amendment, plus some thirty-three pages of an attached Group Exhibit A, plus two state court opinions unfavorable to plaintiffs, as well as prior motions and affidavits filed herein, which are incorporated by reference. It must suffice to say that

this court has considered all of same in relation to the instant motions, and finds said instant motions to be without any significant merit.

Plaintiffs seek to ignore or relitigate parts of a factual picture which has been heretofore judicially determined with finality, and thereby to raise federal antitrust and constitutional violations which simply do not exist. The material facts, as heretofore shown beyond dispute or found by other courts, adequately demonstrate that defendants exercised their public authority in the premises responsibly and with fairness to plaintiffs, without violation of any of plaintiffs' rights under the United States Constitution, or otherwise. The idea that some kind of conspiracy was involved, or that the contracting with a single concessionaire for golf shop services created a "monopoly" of any legal significance, is pure fancy.

Defendants move for an order requiring plaintiffs to pay their expenses, including attorney's fees, on these motions. While such might well be justified, there is no specification, and any proceedings for the purpose of determining reasonable allowance would involve more unjustified time and expense. For that reason alone, such motion for expenses must be denied, subject to reconsideration if any further proceedings become necessary in this court.

Accordingly, IT IS ORDERED that plaintiffs' motions for leave to amend the complaint herein and to open, alter or amend the decision herein of June 1, 1976, are DENIED.

IT IS FURTHER ORDERED that defendants' motion for an order for expenses is DENIED.

/s/ ROBERT D. MORGAN
United States District Judge

Entered: June 30, 1976

APPENDIX Q

1970 Illinois Constitution

Article IX, Revenue, Sec. 5

* * *

(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971.

15 United States Code

§ 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by section 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

15 United States Code

§ 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the

several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 United States Code

§ 15

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

42 United States Code

§ 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Ch. 105, § 8-10, Ill.Rev.Stat (1975)

All park districts shall have power to plan, establish and maintain recreational programs, provide musical concerts, to construct, equip and maintain airports, landing fields for aircraft, armories, field houses, gymnasiums, assembly rooms, comfort stations, indoor and outdoor swimming pools, wading pools, bathing breaches, bath houses, locker rooms, boating basins, boat houses, lagoons, skating rinks, piers, conservatories for the propagation of flowers, shrubs, and other plants, animal and bird houses and enclosures, athletic fields with seating stands, golf, tennis, and other courses, courts, and grounds, and the power to make and enforce reasonable rules, regulations, and charges therefor. The express enumeration of each of the foregoing recreational facilities and equipment which park districts are herein given the power to provide shall not be construed as a limitation upon said park districts, nor prohibit any park district from providing any other facilities or equipment which may be appropriate for park purposes in any park of said district, nor shall the same in any way be held to limit the power and authority conferred upon park districts under other sections of this code.

Ch. 105, § 9.1-1 et seq., Ill.Rev.Stat. (1975)

Any park district has the power, subject to the limitations of Section 9.1-1 through 9.1-6 . . . to . . . operate golf courses and toilet, locker and other necessary facilities pertinent thereto . . . to issue its bonds, payable solely from the revenue derived from the operation of such golf courses and facilities . . . The [district's] ordinance shall also pledge the revenue derived from the operation of the golf courses for the purpose of paying maintenance and operation costs, providing an adequate depreciation fund, and paying the principal and interest of the bonds issued hereunder. . . . Bonds issued under Section 9.1-1 of this Article shall be payable solely from the revenue derived from the operation of the golf course, or courses . . . Each park district which issues bonds and acquires or constructs . . . facilities shall charge for the use thereof at a rate which at all times is sufficient to pay maintenance and operation costs. . . . Such district may make, enact, and enforce all needful rules

and regulations for the . . . management . . . of its golf course and for the use thereof. . . . [S]uch district is required to maintain and operate its golf course or courses, as long as it can do so, out of the revenue derived from the operation thereof. . . .

The holder of any bond . . . issued under Section 9.1-1 of this Article in any civil action, mandamus or other proceeding, may enforce and compel performance of all duties required by Section 9.1-1 through 9.1-5 of this Article. This shall include the duties of establishing and collecting sufficient rates or charges. . . .

Ch. 127, §§ 132.2, 132.5 and 132.6, Ill.Rev.Stat. (1975)

§ 132.2

It is the purpose of this Act and is hereby declared to be the policy of the State that the principle of competitive bidding and economical procurement practices shall be applicable to all purchases and contracts by or for any State agency.

§ 132.5

All purchases, contracts or other obligations or expenditure of funds by any State agency shall be in accordance with rules and regulations governing such State agency procurement practices and procedures which it shall promulgate and publish in sufficient number for distribution to persons interested in bidding on purchases or contracts to be let by such State agency. . . .

§ 132.6

The rules and regulations required by Section 5 of this Act may provide that prospective bidders be prequalified to determine their responsibility, as required by this Act, and shall provide, among other matters which are not in conflict with the policies and principles herein set forth:

a. That all purchases, contracts and expenditure of funds shall be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, quality and serviceability except as provided in paragraphs e., f. and g. of this Section. . . .

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78 807

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, AN ILLINOIS POLITICAL SUBDIVISION, JOHN R. CANTERBURY, JAMES A. CUMMINGS, BONNIE W. NOBLE, CLYDE WEST, HAROLD A. (PETE) VONACHEN, JR., INDIVIDUALLY AND MEMBERS OF THE BOARD OF TRUSTEES OF THE PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA; RHODELL E. OWENS, INDIVIDUALLY AND AS DIRECTOR OF PARKS AND RECREATION; JACK M. FULLER, INDIVIDUALLY AND AS ADMINISTRATIVE ASSISTANT; DANIEL B. OPPLEMILLER, INDIVIDUALLY AND AS BUSINESS ADMINISTRATOR; FRANK D. BORROR, INDIVIDUALLY AND AS SUPERINTENDENT OF MAINTENANCE; WILLIAM McD. FREDERICK, INDIVIDUALLY AND AS ATTORNEY OF PLEASURE DRIVEWAY & PARK DISTRICT OF PEORIA,
Petitioners,

vs.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES AND RICHARD HOADLEY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-807

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, AN ILLINOIS POLITICAL SUBDIVISION, JOHN R. CANTERBURY, JAMES A. CUMMINGS, BONNIE W. NOBLE, CLYDE WEST, HAROLD A. (PETE) VONACHEN, JR., INDIVIDUALLY AND MEMBERS OF THE BOARD OF TRUSTEES OF THE PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA; RHODELL E. OWENS, INDIVIDUALLY AND AS DIRECTOR OF PARKS AND RECREATION; JACK M. FULLER, INDIVIDUALLY AND AS ADMINISTRATIVE ASSISTANT; DANIEL B. OHLEMILLER, INDIVIDUALLY AND AS BUSINESS ADMINISTRATOR; FRANK D. BORROR, INDIVIDUALLY AND AS SUPERINTENDENT OF MAINTENANCE; WILLIAM McD. FREDERICK, INDIVIDUALLY AND AS ATTORNEY OF PLEASURE DRIVEWAY & PARK DISTRICT OF PEORIA,
Petitioners,

vs.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES AND RICHARD HOADLEY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

STATEMENT.

The appeal in this case followed the District Court's dismissal of respondents' two count complaint. Count I alleges antitrust violations under 15 U. S. C. §§ 1, *et seq.* and 28 U. S. C.

§ 1337. Count II alleges deprivations of federal rights under color of law and invokes 28 U. S. C. § 1343 and 42 U. S. C. § 1983.

On May 26, 1977, the Seventh Circuit reversed and remanded on both counts. [*Kurek* v. *Pleasure Driveway & Park District*, 557 F. 2d 580 (7th Cir., 1977)].[1] Petitioners' petition for rehearing and for rehearing *en banc* were denied on August 11, 1977. On August 22, 1977, the 7th Circuit granted their motion for stay of mandate.[2]

On September 19, 1977, petitioners filed their petition for certiorari [*Pleasure Driveway & Park District* v. *Kurek* (Supreme Court No. 77-440)] and presented, *inter alia*, the following questions:

> Whether Petitioners are subject to the Federal Antitrust Laws and treble damage liability?
>
> Whether a Federal Court of Appeals may properly afford respondents additional opportunities to relitigate claims previously adjudicated in the Courts of Illinois and federal courts or review those state court adjudications?[3]

On March 29, 1978, this Court decided *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. ....., 98 S. Ct. 1123 and affirmed the opinion and judgment of the 5th Circuit in *City of Lafayette* v. *Louisiana Power & Light Co.*, 532 F. 2d

1. This opinion is reproduced as Appendix C to the Petition for Certiorari.

2. Presumably because this Court had granted certiorari in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. ..... on March 28, 1977.

3. As stated in their pending petition for certiorari, petitioners again present these questions thusly [Petition, 2]:

> 1. Whether determination of facts in state court litigation which are essential to federal claims precludes relitigation of those factual issues in subsequent federal antitrust and civil rights actions?
>
> 2. Whether the actions of a unit of local government, taken pursuant to the requirements of state statute and clearly articulated state policy which provides for active supervision are exempt from federal antitrust laws?

431.[4] On April 24, 1978, this Court entered the following order in this case:[5]

> The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. ..... (1978).[6]

On September 11, 1978, the 7th Circuit filed its opinion "On Remand from the Supreme Court of the United States" [Pet. App. A-1 thru A-3] and declared, *inter alia:*

> As to plaintiffs' antitrust claims, which are the only ones affected by *Louisiana Power*, we reinstate our prior judgment finding as we do, that our prior decision correctly anticipated the Supreme Court's holding therein. Defendants' arguments that the antitrust claims have been adjudicated in the state court proceedings are insupportable both because the state courts have not in fact purported to do so and because jurisdiction of federal antitrust suits is exclusively in the federal courts. *See* 15 U. S. C. §§ 15, 26; 28 U. S. C. § 1337.[7] Needless to say, at the pleading stage at which this case is, we decline to consider defendants' numerous arguments that reduce effectively to the assertion that plaintiffs cannot prove the allegations *we*

4. Extensively quoted and relied upon by the 7th Circuit in its opinion of 5/26/77. [See: Pet. App., 18-19].

5. *Pleasure Driveway & Park District* v. *Kurek*, Supreme Court No. 77-440 [Pet. App., 4].

6. On the same date the Court entered precisely the same order in *City of Impact* v. *Whitworth*, No. 77-734 [citation below 559 F. 2d 378 (5th Cir., 1977)] and *Fairfax Hospital Assn.* v. *City of Fairfax*, No. 77-826 [Citation below 562 F. 2d 280 (4th Cir., 1977)]. See: Journal of Procedings, 46 U. S. L. W. at 3664.

7. In light of the questions presented in *Pleasure Driveway & Park District* v. *Kurek*, No. 77-440 and in light of the general grant of certiorari with remand limited to "further consideration in light of *City of Lafayette* v. *Louisiana Power & Light*" it can be reasonably argued that this Court has either resolved the questions now presented against the petitioners on the merits or at the very least has implied that they are not certworthy.

have held sufficient to state a claim for which relief can be granted.[8] [Emphasis added].

Moreover, the opinion concluded with the order that "The mandate shall issue forthwith." [Pet. App. 3].

On September 15, 1978, petitioners applied to the 7th Circuit for stay of mandate pending certiorari and suggested substantially the same questions as are here presented. On September 22, the application for stay was denied "as this court finds no merit in the request."

On, or about, September 25, 1978, petitioners filed their application for "an order recalling and staying the mandate of the Court of Appeals for the Seventh Circuit" in this Court [*Pleasure Driveway & Park District* v. *Kurek*, Supreme Court No. A-287] and presented, *inter alia*, the following questions in support of their claim concerning the likelihood of certiorari:

> Does the Court of Appeals properly apply the principles of collateral estoppel and res judicata in light of prior state and federal decisions from 5 years of litigation between these parties?

8. In its opinion of 5/26/77, the 7th Circuit at 557 F. 2d pp. 584-586 [Pet. App. A-8 thru A-11] set out the allegations with some particularity and summarized thusly:

> On January 29, 1974, the Park District terminated plaintiffs' concession rights and on February 20 of that year the Park District terminated plaintiffs' employment. On January 23, 1974, GSM was awarded pro shop concession rights at all of the Park District's five golf courses. The reasons for these events and the manner in which they came about are at the heart of this lawsuit. [557 F. 2d at 585 (Pet. App., A-8)].
>
> [T]he complaint . . . charges that the threat of a monopolistic license to GSM and the demand for uniformly increased fees were used by the defendants in a broader conspiracy to coerce plaintiffs into raising and fixing their retail prices, and that the award of the GSM license was made to punish plaintiffs for refusing so to be coerced. [557 F. 2d at 587 (Pet. App., A-12)].
>
> Nothing in the Illinois statutory provisions governing park districts even remotely suggests that Illinois has authorized, let alone compelled, park districts to enrich themselves by coercing horizontal retail competitors operating under concession licenses to fix retail prices in what would otherwise be a plain violation of the Sherman Act. [557 F. 2d at 590 (Pet. App., A-19)].

> Does the Court of Appeals opinion properly apply the Supreme Court test as stated in *City of Lafayette, supra,* where the defendant park district is authorized by the state legislature to carry on the activity complained of *AND* when the state legislature has mandated or directed the method employed by that unit of local government, i.e. the competitive bidding requirement of the Illinois Purchase Act, Ch. 127, § 132.1 *et seq.*, Ill. Rev. Stat. (1973)?

On, or about, October 2, 1978, respondents filed their "Opposition To Petitioners' Application For Stay/Recall of Mandate" and the application was denied by Mr. Chief Justice Burger on October 5, 1978.

On or about November 15, 1978, petitioners filed this pending petition for certiorari and again presents the questions as follows:

> 1. Whether determination of facts in state court litigation which are essential to federal claims precludes relitigation of those factual issues in subsequent federal antitrust and civil rights actions?
>
> 2. Whether the actions of a unit of local government, taken pursuant to the requirements of state statute and clearly articulated state policy which provides for active supervision are exempt from federal antitrust laws?

ARGUMENT.

I.

A.

Petitioners' plea concerning the "doctrine of issue preclusion" [Pet. 14][9] is nothing short of perplexing. If it operated in the antitrust area—which it does not—it would operate in favor of respondents.

The state court decision primarily relied upon is *Pleasure Driveway & Park District* v. *Kurek*, 27 Ill. App. 3d 60, 325

9. Collateral estoppel.

N. E. 2d 650 (3d Dist., 1975)]. It was a forcible detainer case which held that each respondent's yearly concession agreement expired by its terms on December 31, 1973, that respondents were entitled to thereafter remain in possession in order to negotiate new contracts despite the GSM bid and that respondents' employment rights were separate from their business rights *a fortiori* not germane to the issue of possession. That opinion further found [Petition Appendix J, A-64 & A-65]:

> In November of 1973 negotiations commenced between the Park Board and the golf pros (respondents) for the 1974 contracts and the Park Board also prepared bid specifications for concession rights for 1974. *Having failed to reach agreement with the defendants (respondents), the Park Board on January 19, 1974, awarded a three year contract for concession rights to Golf Shop Management, Inc.* (GSM) *with the stated intention of continuing (their) employment as greenskeepers.* On January 21, 1974 each of the five golf pros (respondents) were served with a 30-day notice to terminate tenancy of the premises occupied by the concession shops and on February 20, 1974, the Park District filed its complaint in this cause to recover possession of the five golf pro shops at its golf courses (footnote omitted). *On the same date the Park Board terminated the employment of the golf pros* (respondents) as greenskeepers. [Emphasis added].

When fleshed by the evidence showing that "having failed to reach agreement with the (respondents)" was the abortive attempt to coerce them into price fixing agreements, the state court judgment supports rather than defeats the following findings by the 7th Circuit:

> On January 19, 1974, the Park District terminated plaintiffs' concession rights and on February 20 of that year the Park District terminated plaintiffs' employment. On January 23, 1974, GSM was awarded pro shop concession rights at all of the Park District's five golf courses. *The reason for these events and the manner in which they came about are at the heart of this lawsuit.* [Pet. App. A-8 (Emphasis added)].

> [T]he complaint . . . charges that the threat of a monopolistic license to GSM and the demand for uniformly increased fees were used by defendants in a broader conspiracy *to coerce plaintiffs into raising prices and that the award of the GSM license was made to punish plaintiffs for refusing so to be coerced.* [Pet. App. A-12 (Emphasis added)].

But in any event, the 7th Circuit has here held that "Defendants' arguments that the antitrust claims have been adjudicated in state court proceedings are insupportable both because the state courts have not in fact purported to do so and because jurisdiction of federal antitrust suits is exclusively in the federal courts. *See* 15 U. S. C. §§ 15, 26; 28 U. S. C. § 1337" [Pet. App. A-1 & A-2]. This has long been the rule. [See e.g.: *Freeman* v. *Bee Machine Co.*, 319 U. S. 448; *General Investment Co.* v. *Lake Shore & Mich. So. R. Co.*, 260 U. S. 261].

In terms of this case, the principle was nicely stated by Judge Learned Hand in *Lyons* v. *Westinghouse Electric Corp.*, 222 F. 2d 184, 189 (2d Cir., 1955), thusly:

> In the case at bar it appears to us that the grant of the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; *at least on occasions like those at bar, where the pututive estoppel includes the whole nexus of facts that make up the wrong.* The remedy provided is not solely civil; ⅔rds, of the recovery is not remedial and inevitably presupposes a punitive purpose. It is like a *qui tam* action, except that the plaintiff keeps all the penalty, instead of sharing it with the sovereign. There are sound reasons for assuming that such recovery should not be subject to the determinations of state courts. It was part of the effort to prevent monopoly and restrains of commerce, and it was natural to wish it to be uniformly administered, being national in scope. . . . Obviously, an administration of the Acts at once effective and uniform would best be accomplished by an untrammeled jurisdiction of the federal courts. [Emphasis added].

B.

In the words of the court below, Count II of "the complaint charged that plaintiffs were summarily terminated from their public employment positions because they asserted their rights of petition and to due process by litigating their defenses to the Park District's forcible entry and detained action" [Pet. App. A-27].

Petitioners also misstate the civil rights claims. At page 16 of the Petition they say:

> If a litigant chooses to advance his civil rights claims in state court forums, though not required to *and* unreservedly litigates those claims there, he may not ignore adverse state decisions and relitigate the claim in District Court. (Citations).

At the very least, this implies that respondents "advance(d) (their) civil rights claims in state Court" and "unreservedly litigate(d) those claims there",[10] and that is not the truth.

In pertinent part, the relevant state court pleading claimed as follows:[11]

> 6. That at all times relevant and material to the transactions in controversy, the PARK DISTRICT . . . *tortiously interferred*[12] (emphasis added) with the (golf pros) and each of them in . . . the following way:

10. In state court the employment termination claim was by way of counterclaim and the only counterdefendant was the Park District as such. *Monell* v. *New York City Dept. of Social Services*, ... U. S. ..... (46 U. S. L. W. 4569) was not decided until June 6, 1978. Thus, the PARK DISTRICT, as such, wasn't even subject to federal civil rights liability at the time of the state court action.

11. This counterclaim is in the record on appeal as Exhibit V to petitioners' motion to dismiss. The state court findings and judgment is Exhibit Z to the motion to dismiss.

12. "Tortious interference" constitutes a common law cause of action in Illinois. [See e.g.: *City of Rock Falls* v. *Chicago Title & Trust*, 13 Ill. App. 3d 359, 300 N. E. 2d 331]. It has nothing whatever to do with the federal right of petition or with any other right or interest protected under the Petition and Due Process Clauses of the 14th Amendment.

> They summarily and unlawfully terminated defendants' (respondents) salaried employments.

Based upon this counterclaim and the findings and judgment denying it, the 7th Circuit held that the principles of collateral estoppel are not applicable and further found:

> Judge Iben's[13] determination . . . implies . . . that the employment terminations occurred because plaintiffs chose to litigate their rights to possession. In fact the finding expressly refers to plaintiffs' insistence 'through litigation and other ways' on asserting their claim to possession. *Nothing in the state court judgment supports the district court's conclusion that it had been previously adjudicated that 'the exercise of the right to litigate issues' was not the reason for plaintiffs' employment discharges.* [Pet. App. A-29 (Emphasis added)].

" 'A prior judgment operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted *and upon the determination of which the initial judgment necessarily depended.*' [Emphasis in the opinion]. 1 B Moore's Federal Practice 3777 (2d ed., 1965), and, as Judge Learned Hand explained almost forty years before, '. . . [collateral] estoppel extends only to facts decided and necessary to the decision.' Irving Nat. Bank v. Law, 10 F. 2d 721, 724 (2 Cir., 1926)." [*Bourne, Inc.* v. *Allen-Bradley Company*, 480 F. 2d 123, 125 (7th Cir., 1973)].[14]

All that was decided by the Circuit Court of Peoria County was that respondents' terminations because they exercised "the

13. Judge Iben was the state court trial judge.

14. Petitioners' insistent reliance on certain language in *Pleasure Driveway & Park District* v. *Jones*, 51 Ill. App. 3d 182, 367 N. E. 2d 111 (7/11/77) was here before and rejected. [*Pleasure Driveway & Park District* v. *Kurek*, No. 77-440 (Pet. for Cert. pp. 23-24)]. Moreover, all that the Illinois Appellate Court said was that "all the reasons why defendants' (respondents) discharge should be considered wrongful . . . could have been argued and resolved in the case before the circuit court of Peoria County." [Petition 17, Pet. App. A-83]. Even the petitioners concede that *res judicata* is not here applicable. Thus, "what could have been argued and resolved" isn't even relevant, let alone material.

right to litigate issues" did not subject the Park District to liability under Illinois' common law doctrine of tortious interference and the 7th Circuit's holding that "Nothing in the state court judgment supports the district court's conclusion that it had been previously adjudicated that 'the exercise of the right to litigate issues' was not the reason for pliantiffs' employment discharges" [Pet. App. A-29] is clearly correct.

II.

It is impossible to determine just what facts petitioners' rely on in support of their proposition that "The Decision Below Interprets *City of Lafayette, La.* v. *La. Power & Light Co.* to subject a Non-Municipal Unit of State Government Acting Pursuant to the Requirements of State Statute and Clearly Articulated State Policy to Alleged Violations of the Federal Antitrust Laws." From the following, it appears that the petitioners assert that respondents' terminations and concomitant damages resulted from their refusals to enter into competitive bidding,[15] *viz:*

> The instant case involves actions of the Park District . . . taken pursuant to state statutory direction. The Illinois Legislature has by statute clearly said that competitive bidding is the rule in public contracts and sufficient charges for the use of public facilities must be made. Ch. 127, § 132.2 and Ch. 105 § 9.1-1, *et seq.*, Ill. Rev. Stat. (1975). [Petition, 19-20].
>
> If no exemption applies in this case, the next competitive bid in Illinois . . . invites any . . . non-bidder to sue the governmental unit for antitrust violations. The only alternative[16] is to comply with the antitrust laws and violate the state laws requiring competitive bidding. [Petition, 20].

15. If this were the case, then why did petitioners use the highest bidder in the abortive attempt to coerce the non-bidding respondents into *per se* violations of § 1 of the Sherman Act. [See: 557 F. 2d at 585-586 (Pet. App. A-9 & A-10)].

16. Petitioners had an alternative in this case. They could have awarded the bidder the rights rather than using his bid as part of a coercive scheme to force the non-bidding respondents into *per se* violations of § 1 of the Sherman Act.

> These requirements, imposed by the Illinois Legislature in addition to the provisions and expressed purpose of the competitive bidding act, are a clear and explicit mandate from the legislature. [Petition, p. 23].

As is evident from the following excerpts from the principal opinion of the 7th Circuit [*Kurek* v. *Pleasure Driveway & Park District,* 557 F. 2d 580 (Pet. App. C)], this is simply not the case.

> On January 19, 1974, the Park District terminated plaintiffs' concession rights and on February 20 of that year the Park District terminated plaintiffs' employment. On January 23, 1974, GSM was awarded pro shop concession rights at all of the Park District's five golf courses. *The reason for these events and the manner in which they came about are at the heart of this lawsuit.* [Pet. App. A-8 (Emphasis added)].
>
> [T]he complaint . . . charges that the threat of a monopolistic license to GSM and the demand for uniformly increased fees were used by the defendants in a broader conspiracy to corerce plaintiffs into raising and fixing their retail prices and *that the award of the GSM license was made to punish plaintiffs for refusing so to be coerced.* [Pet. App. A-12 (Emphasis added)].
>
> Nothing in the Illinois statutory provisions governing park districts even remotely suggests that Illinois has authorized, let alone compelled, park districts to enrich themselves *by coercing horizontal retail competitors* operating under concession licenses *to fix retail prices in what would otherwise be a plain violation of the Sherman Act.* [Pet. App. A-19 (Emphasis added)].

In its entirety, petitioners' argument constitutes nothing more than abstract hypothesis and does nothing more than suggest this question—How can petitioners persist in their refusal to recognize the case and in the same breath ask the Supreme Court of the United States to grant plenary review?

CONCLUSION.

For the foregoing reasons and for others implicit therein, respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-807

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, an Illinois Political Subdivision, JOHN R. CANTERBURY, JAMES A. CUMMINGS, BONNIE W. NOBLE, CLYDE WEST, HAROLD A. (PETE) VONACHEN, JR., Individually and Members of the Board of Trustees of the Pleasure Driveway and Park District of Peoria; RHODELL E. OWENS, Individually and as Director of Parks and Recreation; JACK M. FULLER, Individually and as Administrative Assistant; DANIEL B. OHLEMILLER, Individually and as Business Administrator; FRANK D. BORROR, Individually and as Superintendent of Maintenance; WILLIAM McD. FREDERICK, Individually and as Attorney of Pleasure Driveway and Park District of Peoria,
Petitioners,

v.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES and RICHARD HOADLEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

Petitioners contend that this case presents this Court with the unique opportunity to reconcile "the conflict between the countervailing purposes of collateral estoppel and exclusive

federal jurisdiction", and the issue "left unresolved" in *City of Lafayette, La. v. La. Power & Light Co.*, — U.S. —, 98 S.Ct. 1123 (1978), as to the type and scope of state mandates sufficient to immunize a unit of local government from federal antitrust laws. Respondents' Brief in Opposition implicitly attempts to divert this Court's attention from the significance of those issues. Instead they have attempted to focus the Court's attention on the details of only one of the lengthy and protracted state proceedings while ignoring the other state proceedings and determinations which decided the essential facts. While such argument would, we believe, be more fully and properly made and considered in the full argument of the case, should this Court grant the Petition for Writ of Certiorari, we file this reply to Respondents' Brief in Opposition for the purposes of indicating to this Court the matters contained in Respondents' Brief which misconstrues Petitioners' position.

Prior state court determinations of essential facts which were fully litigated should be given preclusive effect in subsequent federal cases. [Petition, Part I].

The state court damage decisions upon which Petitioners primarily rely [App. K and M] did in fact contain every allegation of fact necessary to decide and essential to the issues in these proceedings and determined them. The golf pros by their attorney stated at the September 24, 1975 hearing in the trial of the damage action:

> "Mr. Cassidy: But I have a better suggestion. Every fact essential to the ultimate determination of the Court controversies, and I would consider forcible entries and monopolies and fraudulent interferences, has been raised now by these affirmative defenses, and as a matter of law and, this is a pretty nice question, like Parker v. Brown, that could have a terrible impact on a Federal proceeding, is that if ever a case was in a posture, the Complaint in [sic] the Affirmative Defenses are in a posture, supported by those exhibits which are all Judicial documents. As of this moment, for an Order that the Appeal should not be delayed because why should we spend one more hour at the Trial Court level or in the Court of original jurisdiction, taking more evidence, hearing more arguments, etc., when these six defenses, together with their claim could resolve the whole controversy once and for all, constitutes an anticipatory appeal and it resolves all questions of law and we could, with alacrity, after an appeal, I am sure, dispose of questions of damage, even in pending controversies . . ."

As an additional admission of the completeness of that decision, the golf pros' motion [Petition, App. p. A-87] stated that the matters and things contained in that damage action and decision were the same as those before the Seventh Circuit Court of Appeals in this matter in order that the Third District Appellate Court consider the Seventh Circuit Court of Appeals opinion and reverse the state court decision. That motion further stated:

> "(a) The trial court in this case rejected defendants' affirmative antitrust defenses [as to Illinois Antitrust Act] and Exhibit A hereto [Seventh Circuit Opinion] holds that the Park District is indeed subject to liabilities to the antitrust laws.
>
> (b) The trial court in this case measured defendants' liability under the complaint on the basis of what is referred to in Exhibit A hereto, *inter alia*, as follows: 'that GSM made an economically unrealistic "sham" proposal, not actually to be put into effect'. . . .
>
> 4. Furthermore, the opinion of the 7th Circuit with regard to the employment termination [Exhibit A, pp. 20-23] should be considered by this court with regard to the judgment on review or the counterclaim involving the ***same subject matter*** . . ."

The Third District Appellate Court after permitting the filing of the Seventh Circuit Court of Appeals opinion as additional authority stated:

> "From a review of defendants' brief in this cause of which the Circuit Court of Appeals was unaware, all the reasons why defendants discharge should be considered wrongful were or could have been urged and resolved in the case before the Circuit Court of Peoria County." [Petition, App. p. A-83].

The Third District Appellate Court also stated in that opinion:

> "However, in their motion to add as additional authority the opinion of the 7th Circuit Court of Appeals previously referred to, defendants argue that since the 7th Circuit Court of Appeals has decided that the plaintiff may be subject to damages for antitrust violations, we should reverse the trial court's dismissal of defendants' affirmative antitrust defenses. We decline to do so. Having failed to initially allege and argue the dismissal of the antitrust defense, defendants have waived whatever assignment or error they might have had to that dismissal. . . ." [Petition, App. p. A-79]

While Petitioners refer to the state court decision in the original forcible entry and detainer case [Petition, p. 13 and App. J] as having determined that the golf pros' contract rights and rights to possession had ended as a matter of law on December 31, 1973, Respondents' claim that we "primarily relied upon" that decision [Respondents' Brief, p. 5] is incorrect. The Petitioners primarily rely on the state court determinations in the damage cases which were separate and distinct from the forcible entry and detainer case. The records in the damage proceedings [Petition, App. K and M] show that the Respondents raised several affirmative defenses and voluntary counterclaims in addition to and in defense of the issues relating to

the damages suffered by the Park District. The determinations necessarily made by the state courts on those issues and in those proceedings included: 1) that the alleged "sham" contract was a valid, arms-length contract, arrived at through open competitive bidding, consistent with the clear public policy of state laws, [App. K and M]; 2) that the alleged "sham" contract was a measure of the fair value of the premises and/or licenses for the concession rights, [App. K and M]; 3) that the alleged "sham" contract was neither an illegal sales tax nor an attempt to punish the pros [App. K and M]; and 4) that the golf pros' employment rights were properly terminated in accord with the published policies of the Park District and did not violate the golf pros' civil rights [App. K and M].

While the forcible entry case [Petition, App. J] determined the important question as to the termination of the Respondents' contract rights, as a matter of law, on December 31, 1973, it is the state court damage cases [Petition, App. K and M] which determined the facts listed above which should be given preclusive effect. In both cases the Illinois Supreme Court denied Respondents' Petition for Leave to Appeal and no further appeals were attempted to this Court.

Apparently Respondents admit that the claims made in the state court damage action were voluntarily filed, but contend [Respondents' Brief, pp. 8 and 10] that the claims were strictly limited to "tortious interference". Petitioners contend that under the doctrine of issue preclusion, collateral estoppel, or *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and its progeny,[1] the factual determinations in these voluntarily advanced claims of the golf pros in prior state court adversary, evidentiary hearings bar further consideration by federal courts of the specific issues determined therein and the golf pros civil rights claims under Count II of the Complaint.

---

[1] See Petition Footnote 5 for further explanation.

II

As to Respondents' argument made in Part II of their Brief, Petitioners contend that the Court of Appeals erred in their application or reconsideration in light of *City of Lafayette, La. v. La. Power and Light Co.*, — U.S. —, 98 S.Ct. 1123 (1978). The Respondents make no argument as to whether the provisions of the Illinois Competitive Bidding Act and the Park District Code [Petition, App. Q, pp. A-109-A-111] are the type of state mandate or directive which this Court included in the holding in the *City of Lafayette* case. We contend that the Court of Appeals did not concern itself with that issue and that the failure in light of the *City of Lafayette* case to consider the essential ingredients of state mandate or directive was error, and leads to aberrational results never intended by this Court.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Petition for Writ of Certiorari be granted and that this Court fully review the issues herein, reaffirm the district court and reverse the Court of Appeals decision.

Respectfully submitted,

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